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ABSTRACT

This supplement to ED 086 806 discusses developments in the field of equal employment opportunity (EEO). A section on recent developments under Title VII of the Civil Rights Act of 1964, as amended, covers the American Telephone and Telegraph Consent Decree, other conciliation and consent agreements, labor relations aspects, individual suits, testing and other employee selection procedures, seniority, sex discrimination and employee benefits, validity of performance appraisals, and processing of complaints by the EEO Commission. The next section briefly discusses recent developments under executive order 11246, as amended (compliance by specified types of government contractors). Other routes to federal court action are then covered. A section on recent developments under the Age Discrimination in Employment Act of 1967 addresses work-force reduction problems and relationship of the job to the essence of the business. Recent developments under the Equal Pay Act of 1963 are then presented. A final section focuses on new laws and regulations: Rehabilitation Act of 1973, as amended: Vietnam Era Veterans Readjustment Assistance Act of 1974: and Title IX (Educational Amendments 1972) regulations. Appendixes, amounting to approximately two-thirds of the document, include additional excerpts from federal court decisions about nondiscrimination and additional texts of various constitutional provisions and federal laws and regulations, as most recently amended. (YLB)

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Nondiscrimination in Employment, 1973-1975

A Broadening and Deepening National Effort

By Ruth G. Shaeffer

A Research Report from The Conference Board's
Division of Management Research
Harold Stieglitz, Vice President

CE 026 510

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Foreword

Nondiscrimination in Employment: Changing Perspectives, 1963-1972 (Report No. 589) covered a ten-year period. At the request of many Associates and with the welcome assistance of a considerable number of subject-matter specialists —some of whom we like to refer to as "the court-decision-watchers"—Ruth Shaeffer has now updated her fine research study. Reflecting recent rapid developments in the field of equal employment opportunity, this report, although almost as long as the original, covers only the two-and-one-half-year period from January, 1973 through June, 1975.

Many Associates tell us that they have been providing the initial *Nondiscrimination* report to their EEO specialists and personnel managers at all locations as a ready reference manual. Some have also been providing it to key line managers during training programs designed to help them understand and comply with these important federal laws and regulations. Both groups can now be brought up to date by means of this supplemental volume.

The Conference Board plans to continue to investigate and report on this country's efforts: (1) to move toward the goal of equal employment opportunity regardless of race, color, religion, sex, national origin, or age; and (2) to find affirmative ways to help special groups, such as the handicapped and Vietnam-era veterans, obtain suitable jobs.

ALEXANDER B. TROWBRIDGE
President

July 1, 1975

Introduction

THE MID-1960's marked a watershed in American efforts to deal with the problem of discrimination in employment. Prior to that there had, of course, been many state and local FEP laws, most of which were poorly enforced. There had also been some federal Executive Orders, including one establishing a voluntary national program known as Plans for Progress. But the civil unrest of the mid-1960's made it plain that these limited efforts had failed. We moved on to compulsion based on major federal laws and regulations.

Conference Board Report No. 589, *Nondiscrimination in Employment: Changing Perspectives, 1963-1972*, traced a decade of experience with:

- The Equal Pay Act of 1963
- Title VII of the Civil Rights Act of 1964, as amended
- Executive Order 11246, as amended
- The Age Discrimination in Employment Act of 1967

That initial report highlighted the evolution in the federal courts of a sweeping new legal definition of what constitutes discrimination in employment because of race, color, religion, sex, national origin, and age.

In 1971, in *Griggs v. Duke Power Co.*,[1] the Supreme Court unanimously ruled that it is the *consequences* of an employer's actions, and not his intent, that determine whether he is discriminating. The Court held that if the policies, standards or practices of an employer or a union have an *adverse effect* on the employment opportunities of any of the groups protected by law, they can be justified only by proving them necessary to the safe and efficient operation of the business. (See Exhibit 1.) Federal courts have also held that *affirmative action* is required: (1) to seek out and employ qualified members of all protected groups represented in the labor force being drawn upon; and (2) to correct and avoid carrying forward the effects of past discrimination, especially among present employees.

But even though these fundamental principles have now been firmly established, equal employment opportunity is by no means an area of settled law and corporate practice. Much has happened in the two years since the original Conference Board study was published, including the passage of new laws calling for affirmative action by government contractors to facilitate the hiring and advancement of the handicapped and of Vietnam-era veterans.

[1] 401 U.S. 424 (1971).

Ongoing Monitoring

"Court-decision-watchers" warn that the federal laws dealing with nondiscrimination in employment are complex and that the interpretation of many of their provisions by the courts is still in the developmental phase. They also note that many state and local nondiscrimination laws need to be taken into account. Accordingly, they are not surprised that many larger organizations are making sure that specialized legal counsel is available to their personnel executives. Ongoing monitoring of this important emerging field of the law is obviously needed.

Exhibit 1

The Supreme Court Interprets Title VII

"The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."

* * *

". . . Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

". . . The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

"On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. Both were adopted, as the Court of Appeals noted, without meaningful study of their relationship to job-performance ability. Rather, a vice president of the Company testified, the requirements were instituted on the Company's judgment that they generally would improve the overall quality of the work force.

"The evidence, however, shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria are now used. The promotion record of present employees who would not be able to meet the new criteria thus suggests the possibility that the requirements may not be needed even for the limited purpose of preserving the avowed policy of advancement within the Company. . . .

". . . We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.

"The Company's lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training. But Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More that that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."

* * *

"The Company contends that its general intelligence tests are specifically permitted by § 703(h) of the Act. That section authorizes the use of 'any professionally developed ability test' that is not 'designed, intended, *or used* to discriminate because of race.' . . .

"The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting § 703(h) to permit only the use of job-related tests. The administrative interpretation of the Act by the enforcing agency is entitled to great deference. . . . Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the Guidelines as expressing the will of Congress."

* * *

"Nothing in the Act precludes the use of testing

or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract."

—Excerpts from the decision of the Supreme Court of the United States, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). This case is discussed on pages 18-20 of Report No. 589.

The following text—including additional excerpts from federal court decisions about nondiscrimination (Appendix A) and additional texts of various Constitutional provisions, and federal laws and regulations, as most recently amended (Appendix B)—serves as a *supplement to*, not a replacement of, Report No. 589. It brings the unfolding chronology of events related to equal employment opportunity up through June 30, 1975. And it highlights a broadening and deepening national effort to eliminate discrimination in employment in all sectors of the economy for all the groups protected by the various federal laws.

Recent Developments under Title VII of the Civil Rights Act of 1964, as Amended*

The AT&T Consent Decree

CHANGE HAS continued at a rapid pace in the field of Title VII law and employer and union practice. In January, 1973, just when the initial Conference Board report on nondiscrimination was going to press, the American Telephone and Telegraph Company, and all associated Bell System operating companies, entered into a sweeping consent agreement with the Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Labor. Among the provisions of this agreement were:

- A model Affirmative Action Plan to be implemented in all Bell System companies. The plan not only included goals and timetables for increasing the representation of minorities and women in job classifications where they were currently underutilized, but also provided for goals and timetables to correct the underrepresentation of males in telephone operator and clerical classifications.
- Special transfer and promotion rights allowing basically qualified (not necessarily best qualified) minorities and women to move into either inside or outside craft jobs. Lump-sum payments of up to $400 were provided for each individual successfully making such a move. (Observers regarded these payments as being in lieu of possible backpay.)
- Special evaluations at assessment centers to determine the potential for promotion to middle-management positions of a large number of female college graduates who, when they had been hired during the period from 1965 through 1971, were placed directly on first-level managerial positions without even being considered for AT&T's fast-track management development program (IMDP).[1] Immediate salary increases of $100 per month were provided for those assessed as having satisfactory middle-management potential, and they were immediately placed on the rosters of promotable employees.
- Adjustment of the compensation of many nonmanagerial women to ensure equal pay for equal work.
- The right of Bell System companies to use validated tests along with other job-related considerations in assessing individual qualifications was expressly mentioned, but AT&T agreed not to use such testing as a justification for failing to meet the goals and timetables for any job classifications. (A similar provision was included with respect to the use of assessment center results.)
- For their part, the federal administrative agencies acknowledged that the model programs included in the appendix to the consent agreement were consistent with Revised Order No. 4, and constituted a "bona fide seniority or merit system" under Title VII. It was also acknowledged that the agreement was consistent with the Equal Pay Act.[2]
- AT&T did not admit that it had previously been violating any law, but the entire agreement was filed as a Consent Decree in a Federal District Court, thus bringing its interpretation and

* For the full text, see Appendix B. Many aspects of this law are discussed in Report No. 589.

[1] For a description of AT&T's assessment centers and its IMDP program, see pages 98-118 in Conference Board Report No. 558, *Staffing Systems: Managerial and Professional Jobs*, by Ruth G. Shaeffer.

[2] To protect AT&T in the event of subsequent court challenges or changes in administrative views, appropriate "opinion letters" were issued. It was also agreed that the charges of discrimination that were pending before the Federal Communications Commission would be dropped.

compliance with its provisions under judicial supervision.

The first-year cost of the settlement was estimated at $38 million, with additional wage-increase costs of from $25 to $35 million being built in for the next five years. AT&T subsequently reported that its actual costs were somewhat higher because so many of its female managers were assessed as having satisfactory promotion potential.

Reactions in the business community were mixed. Some felt that AT&T had "given away the store." They were horrified not only by the size of the dollar amounts involved but also by the intrusion of federal agencies into matters they had always thought of as being within management's sole discretion. But AT&T's executives insisted they had only done what the law required; and many of those who had been watching the gradual evolution of nondiscrimination law in the federal courts agreed.

Furthermore, the "court-decision-watchers" pointed out that, while this consent agreement certainly put all employers on notice that discrimination in employment could be very costly, the actual dollar amounts involved needed to be kept in proper perspective. The Bell System companies had about 750,000 employees, over half of whom were women, and AT&T's 1972 profits were $2.5 billion. Also, when compared with the $4 billion that some feminists asserted AT&T owed in backpay to its female employees, the estimated costs of consent agreement seemed modest.

Some personnel specialists also noted that AT&T had by no means ceded its decision-making power with respect to selecting, transferring and promoting, and compensating its work force. Indeed, a few even commented that, thanks to the provisions of its consent agreement, the giant utility was probably in much better shape on EEO matters than most other companies. At least AT&T knew with considerable assurance what it could and could not do under the exemption for a "bona fide seniority or merit system" included in Section 703 (h) of Title VII. But many did note that the agreement failed to provide AT&T with protection against suits brought by *individuals* and that these might lead to additional, even conflicting, remedies including substantial backpay awards.

In May, 1975, AT&T and the federal administrative agencies signed a proposed Supplemental Order which, assuming it withstands a union challenge and is approved by the Federal court, will cost the company an estimated additional $2.5 million. The follow-up agreement is based on the failure of some of the Bell System operating companies to achieve all the goals specified in the 1973 consent agreement—despite "a substantial accomplishment" (see Exhibit 2). The follow-up agreement calls for "priority placement" of minorities and women in certain job categories where the company had failed to achieve the agreed-upon goals. It also adjusts some of the 1973 goals for moving women and men into nontraditional jobs (based on unforeseen difficulties in doing so); and it clarifies many provisions of the original agreement, including the relation of the "affirmative action override" to seniority

Exhibit 2

"Substantial Progress" and "A Substantial Accomplishment"

"On January 18, 1973, a Consent Decree was agreed to by AT&T, on behalf of itself and the Bell System operating companies, and various government agencies establishing procedures to assure equal employment opportunities for women and minorities at such Companies. In order to implement that Decree, the Plaintiffs established a Government Coordinating Committee (GCC) composed of representatives of The Equal Employment Opportunity Commission (Offices of Compliance and the General Counsel), the Department of Labor (Office of the Solicitor, Divisions of Civil Rights and Fair Labor Standards, and the Office of Federal Contract Compliance),

the Department of Justice, and the General Services Administration. Similarly the Defendant AT&T added staff to its Human Resources Development Department (HRD), to work with the GCC and to implement the Decree. The GCC and HRD spent thousands of hours in order to assure compliance with the Decree.

"It appears from an analysis of reports filed with the GCC that Bell System Companies made substantial progress, as shown in the following chart, during 1973:

	Profile 1/1/73	Net Gain in 1973	% Increase
Women, Second level management and above	5,168	1,280	25%
Women, Craft jobs	6,407	4,996	78%
Blacks, Second level management and above	506	171	34%
Blacks, Craft	12,295	1,591	13%
Spanish-surnamed, Second level management and above	196	53	27%
Spanish-surnamed, Craft jobs	5,267	1,138	22%
Other minorities (all jobs)	5,825	1,489	26%
Males, Clerical and Operator jobs	10,310	8,369	81%"

* * *

"Nevertheless, the 1973 reviews indicated that 1973 intermediate targets were not met for many job classifications in many companies. The GCC concluded that these failures were attributable to the following causes: (1) in some companies initially there was ineffective management control of the program; (2) as noted above, the initial monitoring controls were not effective; (3) in some companies the 'affirmative action override' was used with insufficient frequency to meet intermediate targets; . . . (4) in some cases, greater efforts could have been made affirmatively to recruit particular race, sex or ethnic groups where such groups were underutilized and intermediate targets were not being achieved; and (5) procedures were not adopted to deal with certain situations where test disqualifications of applicants from underutilized minority groups contributed to the failure to meet intermediate targets for such groups.

"Based on these reviews, the GCC entered into discussion with AT&T to resolve the problems encountered in achieving 1973 intermediate targets. During these discussions, the GCC reviewed reports of 1974 target performance. These reports showed that system-wide, Bell operating companies achieved more than 90% of their 1974 intermediate targets.

"The combined 1973 and 1974 performance, as shown in the following chart, represents a substantial accomplishment:

	Profile 12/31/74	Net Gain in 1973 & 74	% Increase
Women, Second level management and above	7,570	2,402	46%
Women, Craft job	14,032	7,625	119%
Blacks, Second level management and above	921	415	82%
Blacks, Craft jobs	14,073	1,778	14%
Spanish-surnamed, Second level management and above	379	183	93%
Spanish-surnamed, Craft jobs	7,082	1,815	34%
Other minorities (all jobs)	8,397	2,572	44%
Males, Clerical and Operator jobs	25,456	15,146	147%"

—Excerpts from the Interim Report submitted in May, 1975, to the United States District Court, Eastern District, Pennsylvania, concerning progress under the original AT&T Consent Decree. This report accompanied the proposed Supplemental Order.

rights, and what constitutes "good faith effort" in general, and especially when it comes to moving women into nontraditional jobs. (See Appendix A, pages 45 to 49, for excerpts from the agreement.)

Other Conciliation and Consent Agreements

The lessons of the initial AT&T consent decree and of numerous Circuit Court decisions (see Exhibits 3 and 4) were taken to heart by some other major employers. Among the broad conciliation or consent agreements with respect to employment discrimination that were publicized during the next year were those signed by the Bank of California, Pacific Gas and Electric Company, and El Paso Natural Gas Company.

The Bank of California consent agreement is unusual in several respects, and it has since provided the basic pattern for similar agreements with other major California banks, such as the Bank of America and Security Pacific National Bank. It was worked out by the bank with representatives of the National Organization for Women (NOW), the National Association for

Exhibit 3

The Circuit Courts Call for Backpay Awards

"The role that backpay plays in employment discrimination cases is twofold. First, . . . it provides compensation for the tangible economic loss suffered by those who are discriminated against. Secondly, and even more importantly, because backpay awards act as a deterrent to employers and unions, such awards play a crucial role in the remedial process. . . .They provide the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history. If backpay is consistently awarded, companies and unions will certainly find it in their best interest to remedy their employment procedures without court intervention, whether that intervention is initiated by the Government or by individual employees. We think that the courts have at this point sufficiently delineated what constitutes acceptable and nonacceptable employment practices in the areas of seniority and hiring so that neither employer nor union can in good faith claim that they are unaware of what standards are expected of them under Title VII of the Act."

—Excerpt from the decision of the U.S. Court of Appeals, Eighth Circuit (St. Louis), *U.S. v. N.L. Industries, Inc.* 479 F. 2d 354 (1973), denied rehearing and rehearing en banc., 479 F. 2d 382 (1973).

• • •

"The finding of discrimination by the district court, in addition to the nature of the relief (compensatory as opposed to punitive), and the clear intent of Congress that the grant of authority under Title VII should be broadly read and applied mandate an award of back pay unless exceptional circumstances are present."

—Excerpt from the decision of the U.S. Court of Appeals, Sixth Circuit (Cincinnati) *Head v. Timken Roller Bearing Company*, 486 F. 2d 870, (1973).

• • •

"Title VII . . . in authorizing courts to grant equitable relief to those who might be injured by its breach, expressly and impliedly includes the discretion to award back pay. Given this court's holding that '[a]n inextricable part of the restoration to prior [or lawful] status is the payment of back wages properly owing to the plaintiffs'. . . it becomes apparent that this form of relief may not properly be viewed as a mere adjunct of some more basic equity. It is properly viewed as an integral part of the whole of relief which seeks not to punish the respondent but to compensate the victim of discrimination."

—Excerpt from the decision of the U.S. Court of Appeals, Fifth Circuit, (New Orleans) *U.S. v. Georgia Power Company*, 474 F. 2d 906 (1973).

As We Go to Press

On June 25, 1975 the Supreme Court of the United States issued its decision in *Albemarle Paper Co. v. Moody.* (Nos. 74-389 and 74-428. 10 FEP Cases 1181). The following excerpts deal with backpay awards in Title VII cases:

". . . As the Court observed in *Griggs* v. *Duke Power Co.*, . . . the primary objective [of Title VII] was a prophylactic one:

"It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."

Backpay has an obvious connection with this purpose. If employees faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. . . .

"It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers."

* * *

"It follows that, given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. The courts of appeals must maintain a consistent and principled application of the backpay provision, consonant with the twin statutory objectives, while at the same time recognizing that the trial court will often have the keener appreciation of these facts and circumstances peculiar to particular cases.

"The District Court's stated grounds for denying backpay in this case must be tested against these standards. The first ground was that Albemarle's breach of Title VII had not been in 'bad faith'. This is not a sufficient reason for denying backpay. . . . If backpay were awardable only upon a showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for workers' injuries. This would read the 'make whole' purpose right out of Title VII, for a worker's injury is no less real simply because his employer did not inflict it in

the Advancement of Colored People (NAACP), and others, without the direct involvement of federal enforcement agencies, but it was nonetheless filed in a federal district court.

The bank agreed to try to achieve parity between the representation of minorities in its work force and whatever the minority population of the state turns out to be at the end of 1980. The goals established for increasing the representation of minorities and women in management are rigorous. For example, by the end of 1982 women are expected to hold 40 percent of the entry- and second-level management jobs, 35 percent of the middle-management jobs, and 16 percent of the senior-management jobs. A sizable fund has been established which will be spent on a special employee training and development program for minorities and women. A concerted effort to locate qualified minority and female candidates for vacancies on the bank's board of directors was also pledged.

Since then many other broad conciliation and consent agreements have been signed. But not all companies agree that, given their particular circumstances, this represents a desirable strategy. One top-level industrial relations executive commented:

"There's no reason for companies to roll over and play dead on these matters. We ought to be fighting every inch of the way. In particular we should resist the idea that we must always admit

'bad faith'. Title VII is not concerned with the employer's 'good intent or absence of discriminatory intent' for 'Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation'. . . . To condition the awarding of backpay on a showing of 'bad faith' would be to open an enormous chasm between injunctive and backpay relief under Title VII. There is nothing on the face of the statute or in its legislative history that justifies the creation of drastic and categorical distinctions between those two remedies.

"The District Court also grounded its denial of backpay on the fact that the respondents initially disclaimed any interest in backpay, first asserting their claim five years after the complaint was filed. The court concluded that the petitioners had been 'prejudiced' by this conduct. . . "

"It is true that Title VII contains no legal bar to raising backpay claims after the complaint for injunctive relief has been filed, or indeed after a trial on that complaint has been had. Furthermore, Fed. Rule Civ. Proc. 54 (c) directs that

'every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.'

But a party may not be 'entitled' to relief if its conduct of the cause has improperly and substantially prejudiced the other party. The respondents here were not merely tardy, but also inconsistent, in demanding backpay. To deny backpay because a *particular* cause has been prosecuted in an eccentric fashion, prejudicial to the other party, does not offend the broad purposes of Title VII."

In a footnote elsewhere in the decision the Court also stated:

"The petitioners also contend that no backpay can be awarded to those unnamed parties in the plaintiff class who have not themselves filed charges with the EEOC. We reject this contention. The courts of appeals that have confronted the issue are unanimous in recognizing that backpay may be awarded on a class basis under Title VII without exhaustion of administrative procedures by the unnamed class members."

we are guilty of any class-type discrimination just because of the numbers. Our company has looked into our past personnel actions carefully, and our records show there are many different valid reasons why various individuals have not been hired, promoted and so on. Sometimes they haven't even wanted those jobs. Let the EEOC take us to court if they want to. We're not going to sign a class-type consent agreement. We're going to fight."

In 1974, two exceptionally broad consent agreements were signed that attempted to settle significant EEO problems on an industrywide basis. One was in the steel industry and the other in part of the trucking industry. Both agreements arose primarily from an acknowledged need, in light of court decisions dealing with seniority, to shift over to plantwide seniority systems in place of discriminatory departmental seniority systems, and to provide transfer and promotion rights that protect existing compensation and job rights of minorities and women while bringing them up to their "rightful place" in the more desirable job-progression lines.[3]

But both agreements go far beyond these issues. For example, the steel industry agreement—which has been signed by all but one of the ma-

[3] See, for example, *United States v. United States Steel Corporation* (U.S. District Court, Northern District of Alabama, 371 F. Supp. 1045 (1973), as well as the various seniority-related cases referred to in Report No. 589.

As We Go to Press

On June 12, 1975 the U.S. Court of Appeals, Fourth Circuit (Richmond) issued its decision in *Barnett v. W. T. Grant Co.* (10 FEP Cases 1057). The following excerpts deal with whether a black *employee*, whose own individual claim of discrimination in transfer and promotion was denied can represent a broader class including black *applicants*.

"Barnett began work with Grant in the summer of 1970 as a warehouseman and occasional clerk in the Consolidation Operation. In the fall he became a switcher, moving and parking trailers at the grant facilities and driving trailers to other trucking terminals nn the Charlotte area. But his real desire was to be an over-the-road driver in charge of tractor-trailer rigs making long hauls on the open highway. Grant employed at the time 27 such drivers, all of them white. Barnett's individual charge of discrimination is that he was denied the company's normal 60-day probationary period for fledgling over-the-road drivers because he was black. The record, however, amply supports the district court's finding that instead of suffering invidious discrimination Barnett may actually have received preferential treatment."

* * *

"On this state of facts the district judge found 'that the refusal of the defendant to transfer Barnett and promote him to the job of probationary road driver was not based upon racial grounds, but was based upon a reasonable business decision and judgment as to his lack of maturity, lack of experience, tender age, and not yet stable emotional outlook'. Even though we believe, unlike the district court, that an inference of racial discrimination should be drawn from Grant's all-white over-the-road driver complement, the facts rebut the inference in Barnett's case and plainly show that he simply came up short when offered a special opportunity."

* * *

". . .Viewed broadly, Barnett's suit is an 'across the board' attack on all discriminatory actions by defendants on the ground of race, and when so viewed it fits comfortably within the requirements of Rule 23 (b) (2). . . . We believe such a characterization is more consonant with the broad remedial purposes of Title VII itself, and that the district court's less charitable view, under which Barnett could as a class representative challenge only those *specific* actions taken by the defendants toward him, would undercut those purposes."

"The Fifth Circuit has recently reiterated its similar approach to class actions in employment discrimination cases. In *Long v. Sapp,* 502 F. 2d 34 (5th Cir. 1974), the individual plaintiff challenged her discharge from employment as racially motivated. In her class action, however, she sought to represent not only all black persons discharged by defendant, but also 'all black persons who have applied for employment with the defendant or who would have applied for employment had the defendants not practiced racial discrimination in employment and recruiting." The district court dismissed the second portion of the class action on the ground that the plaintiff as a discharged employee was not a member of the named class. The Fifth Circuit reversed, stating:

> '[Plaintiff] directs her claims at racially discriminatory policies that she alleges pervade all aspects of the employment practices of [defendant]. Having shown herself to be black and a former em-

ployee, . . . she occupies the position of one she says is suffering from the alleged discrimination. She has demonstrated the necessary nexus with the proposed class for membership therein. As a person aggrieved, she can represent other victims of the same policies, whether or not all have experienced discrimination in the same way.' . . .

"Like the plaintiff in Long, Barnett directed his attack at discriminatory policies of defendants manifested in various actions, and as one who had allegedly been aggrieved by some of those actions he had demonstrated a sufficient nexus to enable him to represent others who have suffered from different actions motivated by the same policies."

* * *

"[The company and union's] specific practices and policies go far toward explaining the absence of blacks among both Grant's over-the-road drivers and its supervisory personnel, and when combined with Barnett's statistical evidence they establish a strong case of discrimination forbidden by Title VII. We hold that Barnett proved discrimination with respect to potential black driver applicants and with respect to black applicants for supervisory positions."

* * *

"The district court found evidence that since Barnett instituted this suit defendants had 'begun to take more aggressive steps to recruit black employees in the various departments of the enterprise.' We presume this includes the over-the-road driver contingent, and we note in this regard that Grant has employed two black drivers during the pendancy of this suit. In addition, we are informed that Grant and the Union have negotiated a new agreement providing for carry-over seniority between the Consolidation and Fleet Operations. Based on these changes the district court stated that Barnett's suit may, therefore, have achieved its essential purpose which in such matters is usually to bring about change rather than exact retribution for past transgressions.'

"We agree with the district court's sentiment, but in equal employment opportunity cases a court cannot abdicate to defendants' good faith its duty of insuring removal of all vestiges of discrimination. This cause will therefore be remanded to the district court with instructions to conduct an immediate inquiry into defendants' current practices with respect to Fleet Operation hiring, seniority, carry-over on inter-operations transfers, and recruitment and evaluation of supervisory personnel. Should the court find that any of the disapproved practices survive in any degree, it shall forthwith enjoin their continuation. If the court finds that defendants have completely abandoned the offending practices and replaced them with policies tending to remove their discriminatory effects, we leave it to the district court's considered discretion whether to issue an injunction to insure the continuation of the new policies or instead to retain this case on its docket for a reasonable time and then dismiss it if defendants appear to be pursuing their policies in total good faith. . . .

"Regardless what the district court's inquiry shows, Barnett should recover his costs and reasonable counsel fees. . . . These may be taxed against defendant W. T. Grant Company and/or against International Brotherhood of Teamsters and Teamsters Local 71, and may be allocated among the defendants in such proportions as to the district court may seem just and proper. . . ."

Exhibit 4

Court-ordered Goals and Hiring Ratios to Remedy Past Discrimination

"Once a violation of Title VII is established, the district court possesses broad power as a court of equity to remedy the vestiges of past discriminatory practices. . . .

"Eight circuits, including our own, have construed this delegation of broad equitable power as authorizing the district court to establish goals for the purpose of remedying the effects of past discriminatory conduct. . . . Despite the existence of some tension between the constitutional mandate of non-discrimination, on the one hand, and the use of goals as a kind of 'reverse discrimination,' on the other, the Supreme Court has recognized that 'mathematical ratios,' although forbidden if specified as a permanent or inflexible requirement, may serve as a 'useful starting point in shaping a remedy to correct past constitutional violations.' "

* * *

"At first blush a court-ordered racial goal might appear to violate the language of § 703(j) of the Civil Rights Act which provides that the Act shall not be interpreted to require an employer 'to grant preferential treatment to any individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . in comparison with the total number of percentage of persons of such race . . . in any community.'. . .

"Where a racial imbalance is unrelated to discrimination, § 703(j) recognizes that no justification exists for ordering that preference be given to anyone on account of his race or for altering an existing hiring system or practice. But where the imbalance is directly caused by past discriminatory practices it is readily apparent that if the rights of minority members had not been violated, many more of them would enjoy those rights than presently do so and that the ratio of minority members enjoying such rights would be higher. No longer are we dealing with an 'imbalance' attributable to non-discriminatory causes. The effects of such past violation of the minority's rights cannot be eliminated merely by prohibiting future discrimination, since this would be illusory and inadequate as a remedy. Affirmative action is essential. Since the nature and extent of such action depends on the facts of each case, it must of necessity be left to the sound discretion of the trial judge. . . ."

* * *

"Nor are remedial goals limited to any specific or prescribed form. The precise method of remedying past misconduct is left largely to the broad discretion of the district judge. Goals have been expressed in terms of specific numbers or ratios . . . or percentages. . . . Goals have also been mandated with respect to apprenticeship programs."

* * *

"There remains the question whether the 30% goal fixed by the court exceeded the bounds of its discretion. In considering that issue we must be guided by the principle that the objective of a remedial quota is a limited one. It seeks to place eligible minority members in the position which the minority would have enjoyed if it had not been the victim of discrimination. Of course any attempt to reconstruct what would have happened in the absence of discrimination is fraught with considerable difficulty. But the court is called upon to do the best it can with the data available to it."

—Excerpts from the decision of the U.S. Court of Appeals, Second Circuit (New York), *Rios v. Enterprise Assn. Steamfitters Local 638 of U.A.*, 501 F. 2d 622 (1974).

jor steel companies, as well as by the United Steelworkers of America—also specifies goals and timetables for increasing minority and female representation in certain job categories, deals with employee selection criteria, etc. Furthermore, it provides for a special Implementation Committee at each major plant and for an ongoing industrywide Audit and Review Commit-

tee (which includes a federal government representative and must act unanimously to avoid the possibility of a court challenge of its actions) to allocate $31 million in backpay and to oversee implementation of the agreement, under continuing court supervision.[4] The Federal Government, on its part, has agreed to advise other courts in which individuals bring suits on matters (except backpay) covered by the consent agreement, of the existence of this very broad agreement, and to suggest to those courts that the individual's action is either inappropriate or should be raised in the original court.

Labor Relations Aspects of EEO Matters

Labor relations specialists point out that the steel and trucking industry consent agreements arise out of the collective-bargaining arrangements in those industries. They do not expect the industrywide approach to spread to largely nonunionized industries, or to industries where collective bargaining occurs on a plant, geographical area, or company basis. Nonetheless, they find these agreements notable for their attempt to bring virtually all equal employment matters within the framework of the existing collective-bargaining relationship, including the grievance machinery-arbitration procedure—but with the Federal Government still very much involved.

They point out that unions, as well as employers, are covered by Title VII and have, indeed, already been held either partially or wholly liable for backpay awards in some cases (see Exhibit 5). Moreover, under the National Labor Relations Act (NLRA), as amended, a union has a duty to represent all individuals within the bargaining unit fairly (see Exhibit 6), and increasing numbers of union contracts include nondiscrimination clauses. Also, while the Supreme Court has held that an adverse arbitration decision does not preclude an employee from seeking Title VII relief afresh in the federal courts, the Court's stated reason for holding so is to encourage the possibility of voluntary com-

[4] To receive the allocated backpay, individuals are required to sign a release covering any other claims or liability for past discrimination on the part of the company or the union. The release provisions in both the steel industry agreement and the trucking industry agreement are being challenged in the courts. Also, the major unions in the trucking industry have not consented to the trucking agreement.

Exhibit 5

Union Liability for Backpay

"Plaintiff Carey does not have to prove that either or both of the unions discriminated against black employees. All that need be shown is that the employer discriminated against black employees prior to the passage of the Act and that the present system perpetuates that discrimination. When the employer or union has discriminated in the past, and its present policies renew or exaggerate that discrimination, those policies must yield unless there is an overriding legitimate, nonracial purpose. . . . The Civil Rights Act of 1964 imposes on employers—with the assistance and cooperation of labor representatives—an affirmative duty to devise and implement pertinent objective criteria for determining which applicants for promotion or transfer are qualified to fill particular vacancies. . . . As parties to this action, the Unions must accommodate themselves to revisions in their contracts rules and regulations, necessary to assure compliance with the Act."

* * *

"Because the decision to deny back pay was based on the good faith of Greyhound and the unions, the preceding cases appear to mandate a reversal on this point. We remand for judicial determination of the amount of back pay due Carey and that liability, once ascertained, should be jointly assessed against Greyhound and the two unions, as were the attorney's fees and expenses. A union's role as a party to a collective bargaining agreement can be legally sufficient to impose back pay liability on the union if the agreement violates Title VII. . . ."

—Excerpts from the decision of the U.S. Court of Appeals, Fifth Circuit (New Orleans), *Carey v. Greyhound Bus Co., Inc.*, 500 F. 2d 1372, (1974).

Exhibit 6

Employment Discrimination Laws and the NLRA

"As the war against discriminatory employment practices has intensified, commentators have faithfully catalogued the expanding number of weapons available to complaining combatants. According to one observer 'a single factual situation may result in a charge of employment discrimination based on race which may be pursued under at least eight possible theories for relief in six different forums.' Inevitably, the methods for combatting employment discrimination fit together less as a seamless web than as a patchwork quilt of concurrent jurisdiction, overlapping remedies, and even uncomfortable and confusing gaps. The result has been a tangled briarpatch through which even the most intrepid guide may have difficulty advancing.

"We do not, of course, lack for a chorus outlining and evaluating the comparative advantages and disadvantages of the various remedies for the struggling protagonists. Nor do we lack hardy and redoubtable engineers willing to suggest schemes for bringing some order out of the seeming chaos. Notwithstanding the wealth of assistance supplied by others, however, it is the courts who in the first instance must resolve the difficult and perplexing problems created by the existence of so many alternate routs (sic) toward the same final goal. And because of the constitutional restraints on our authority, as well as our healthy respect for the dangers inherent in charting courses to provide safe passage in the future among shoals only dimly perceived, if at all, in the present, our problem solving must proceed in a less grandiose fashion."

* * *

". . . If Title VII of the Civil Rights Act of 1964 appended no jurisdictional prerequisites or procedural limitations to . . . [The Civil Rights Act of 1866] it is hardly likely that the NLRA did so. Moreover, if concurrent jurisdiction over employment discrimination exists between the NLRA and Title VII, we perceive no reason why resort to the former should be a prerequisite to suit under § 1981. The three statutory remedies exist separately and independently and employment discrimination may be prosecuted simultaneously in the courts and before the NLRB.

"We understand that, as is sometimes the case, the simple answer, though sufficient, may be less than totally satisfying. We certainly need no extraordinary powers of divination to foresee that increased use of §1981 by litigants and a more enthusiastic wielding of the unfair labor practice remedy against employment discrimination by the NLRB will raise the deferral issue or some variation of it again, especially where, unlike here, Title VII is also available as a remedy. . . .

". . . In the war against employment discrimination our agony over tactical problems lying ahead of us must not force us to retreat from all battlefields. Rather, we must continue to evolve a strategy for deploying multiple skirmishes toward a common objective. Congress did not intend to channel all offensives through a single salient, and in this battle we approve maneuvers on two fronts.

"On remand the district court should contour the relief awarded in this suit to that decreed in the NLRA suit to ensure that plaintiff-appellee tastes the fruit of his victory under each but does not enjoy any windfall or unjust enrichment from the overlapping remedies."

—Excerpts from the decision of the U.S. Court of Appeals, Fifth Circuit (New Orleans), *Guerra v. Manchester Terminal Corporation*, 498 F. 2d 641 (1974).

pliance or settlement of Title VII claims (see Exhibit 7).

Many knowledgeable equal employment opportunity coordinators concur that it is desirable to discover and root out EEO complaints just as quickly as possible—before they can fester or spread to infect a whole protected group's relationship with the employer. Some companies have even established special telephone "hot lines" for disgruntled applicants and employees to use; they

Exhibit 7

Arbitration Does Not Preclude a Title VII Suit

"Title VII does not speak expressly to the relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements. It does, however, vest federal courts with plenary powers to enforce the statutory requirements; and it specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit. . . . There is no suggestion in the statutory scheme that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction.

"In addition, legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination. In the Civil Rights Act of 1964 . . . Congress indicated that it considered the policy against discrimination to be of the 'highest priority'. . . . Consistent with this view, Title VII provides for consideration of employment-discrimination claims in several forums. . . . And, in general, submission of a claim to one forum does not preclude a later submission to another. . . . Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination. In sum, Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement."

* * *

"Moreover, the grievance-arbitration machinery of the collective-bargaining agreement remains a relatively inexpensive and expeditious means for resolving a wide range of disputes, including claims of discriminatory employment practices."

* * *

". . . But other facts may still render arbitral processes comparatively inferior to judicial processes in the protection of Title VII rights. Among these is the fact that the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. . . . Parties usually choose an arbitrator because they trust his knowledge and judgement concerning the demands and norms of industrial relations. On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proven especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts."

* * *

"A deferral rule also might adversely affect the arbitration system as well as the enforcement scheme of Title VII. Fearing that the arbitral forum cannot adequately protect their rights under Title VII, some employees may elect to bypass arbitration and institute a lawsuit. The possibility of voluntary compliance or settlement of Title VII claims would thus be reduced, and the result could well be more litigation, not less.

"We think, therefore, that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII. The federal court should consider the employee's claim *de novo*. The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate."

—Excerpts from the decision of the Supreme Court of the United States, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

Exhibit 8

Title VII Discrimination Against an Individual

"The critical issue before us concerns the order and allocation of proof in a private, single-plaintiff action challenging employment discrimination. The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens. . . .

"There are societal as well as personal interests on both sides of this equation. The broad, overriding interest shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise."

* * *

"The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. . . .

"The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for respondent's rejection. . . . Here petitioner has assigned respondent's participation in unlawful conduct against it as the cause for his rejection. We think that this suffices to discharge petitioner's burden of proof at this stage and to meet respondent's prima facie case of discrimination.

". . . Respondent admittedly had taken part in a carefully planned 'stall-in,' designed to tie up access and egress to petitioner's plant at a peak traffic hour. Nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it. . . .

"Petitioner's reason for rejection thus suffices to meet the prima facie case, but the inquiry must not end here. While Title VII does not, without more, compel rehiring of respondent, neither does it permit petitioner to use respondent's conduct as a pretext for the sort of discrimination prohibited by § 703(a)(1). On remand, respondent must, as the Court of Appeals recognized, be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretextual. Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the 'stall-in' were nevertheless retained or rehired. Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.

"Other evidence that may be relevant to any showing of pretextuality includes facts as the petitioner's treatment of respondent during his prior term of employment, petitioner's reaction, if any, to respondent's legitimate civil rights activities, and petitioner's general policy and practice with respect to minority employment. On the latter point, statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks. . . . In short, . . . respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision."

—Excerpts from the decision of the Supreme Court of the United States, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

actively encourage anyone who feels discriminated against in any way to bring the matter to their attention very promptly, whether through the grievance procedure or not. Similarly, some are instructing all supervisors that they *must* bring any comment or gripe they hear about discrimination or "unfairness" to the attention of the EEO coordinator immediately. These companies say they want to investigate and, if at all possible, to settle such matters very quickly without resort to any outside agency or the courts.

In justifying such an approach, one industrial relations director said:

"We had one discrimination case we took to court. We lost. The backpay involved was only $31,000, but our attorneys' fees ran over a quarter of a million dollars!"

Another commented:

"We have a class action suit in court now. It's costing us a fortune both in time and money. Yet I'm quite sure initially it could have been settled for an apology and one-day's backpay."

And another said:

"I never would have believed it was going to turn out this way, but the whole EEO field is really a lot like labor relations. You've got to negotiate agreements you can live with. And even in handling complaints, you don't take big risks over unimportant details. You settle."

Individual Suits under Title VII

Because the Supreme Court's landmark decision in *Griggs v. Duke Power Co.* makes it plain that Title VII prohibits discrimination against whole classes or categories of people—the people of some particular race, color, religion, sex or national origin (see Exhibit 1)—there was confusion about how the law should be applied in cases where an *individual* brought a suit alleging employment discrimination. Lower federal courts requested guidance on the matter, and the Supreme Court provided it in *McDonnell Douglas Corp. v. Green* (see Exhibit 8).

Some court-decision-watchers thought they detected a slight backing away from the wholly results-oriented thrust of the *Griggs* decision in that the individual needed to be "qualified" before being able to establish a prima facie case of discrimination. But others pointed out that if the employer then asserts the individual is not really qualified, the company still is in the position of having to establish the business necessity for any unmet qualifications that have a disparate impact on the protected group to which the individual belongs. Given the strong and broad language at both the beginning and the end of the opinion, most doubted that the Supreme Court had undergone any change of mind.

Testing and Other Employee Selection Procedures

Following the *Griggs* decision by the Supreme Court, the federal courts have been giving "great deference" to the EEOC's Guidelines on Employee Selection Procedures. (See Appendix B in Report No. 589.) Court-decision-watchers point out that once the fact that a particular test or selection practice has a discriminatory effect has been established, then various circuit court decisions (see Appendix A, pages 49 to 51) have given approval to such specific Guideline provisions as:

(1) The need for job analysis as a basis for supervisory ratings in validation studies to establish the job-relatedness of tests.

(2) The need to consider reasonable alternatives that would have less discriminatory effect before claiming an established hiring or promotion practice is a matter of business necessity.

(3) The need to conduct criterion-related validity studies, if they are feasible, rather than simply comparing the content of the test to the job content.

(4) The need to conduct test validation studies that take into account the way the tests are actually being used by the company.

(The first two matters are involved in *Albemarle Paper Co. v. Moody*, a case the Supreme Court will decide later this year.)

As We Go to Press

On June 25, 1975, the Supreme Court of the United States issued its decision in *Albemarle Paper Co. v. Moody* (Nos. 74-389 and 74-428, 10 FEP Cases 1181). The following excerpts deal with employment testing:

"In *Griggs* v. *Duke Power Co.* . . . this Court unanimously held that Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets 'the burden of showing that any given requirement [has] . . . a manifest relation to the employment in question.' . . . This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination — has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants. . . . If an employer does then meet the burden of proving that its tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' . . . Such a showing would be evidence that the employer was using its tests merely as a 'pretext' for discrimination. . . . In the present case, however, we are concerned only with the question whether Albemarle has shown its tests to be job-related."

* * *

"The EEOC has issued 'Guidelines' for employers seeking to determine, through professional validation studies, whether their employment tests are job related. . . . The EEOC Guidelines are not administrative 'regulations' promulgated pursuant to formal procedures established by the Congress. But, as this Court has heretofore noted, they do constitute '[t]he administrative interpretation of the Act by the enforcing agency,' and consequently they are 'entitled to great deference.'

"The message of these Guidelines is the same as that of the *Griggs case* — that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.'

"Measured against the Guidelines, Albemarle's validation study is materially defective in several respects:

"(1) Even if it had been otherwise adequate, the study would not have 'validated' the Beta and Wonderlic test battery for all of the skilled lines of progression for which the two tests are, apparently, now required. . . . The study in this case involved no analysis of the attributes of, or the particular skills needed in, the studied job groups. There is accordingly no basis for concluding that 'no significant differences' exist among the lines of progression, or among distinct job groupings within the studied lines of progression. Indeed, the study's checkered results appear to compel the opposite conclusion.

"(2) The study compared test scores with subjective supervisorial rankings. While they allow the use of supervisorial rankings in test validation, the Guidelines quite plainly contemplate that the rankings will be elicited with far more care than was demonstrated here. Albemarle's supervisors were asked to rank employees by a 'standard' that was extremely vague and fatally open to divergent interpretations. Each 'job grouping' contained a number of different jobs, and the supervisors were asked, in each grouping, to

'determine which ones [employees] they felt irrespective of the job that they

were actually doing, but in their respective jobs, did a better job than the person they were rating against. . . .'"

There is no way of knowing precisely what criteria of job performance the supervisors were considering, whether each of the supervisors was considering the same criteria — or whether, indeed, any of the supervisors actually applied a focused and stable body of criteria of any kind. There is, in short, simply no way to determine whether the criteria *actually* considered were sufficiently related to the Company's legitimate interest in job-specific ability to justify a testing system with a racially discriminatory impact.

"(3) The company's study focused, in most cases, on job groups near the top of the various lines of progression. . . . The Guidelines take a sensible approach to this issue, and we now endorse it. . . . The fact that the best of those employees working near the top of a line of progression score well on a test does not necessarily mean that that test, or some particular cutoff score on the test, is a permissible measure of the minimal qualifications of new workers, entering lower level jobs. In drawing any such conclusion, detailed consideration must be given to the normal speed of promotion, to the efficacy of on-the-job training in the scheme of promotion, and to the possible use of testing as a promotion device, rather than as a screen for entry into low-level jobs. . . . The issues take on special importance in a case, such as this one, where incumbent employees are permitted to work at even high-level jobs without passing the company's test battery. . . .

"(4) Albemarle's validation study dealt only with job-experienced, white workers; but the tests themselves are given to new job applicants, who are younger, largely inexperienced, and in many instances nonwhite. The Standards of the American Psychological Association state that it is 'essential' that

> '[t]he validity of a test should be determined on subjects who are at the age or in the same educational or vocational situation as the persons for whom the test is recommended in practice.'

The EEOC Guidelines likewise provide that '[d]ata must be generated and results separately reported for minority or nonminority groups wherever technically feasible.' . . . In the present case, such 'differential validation' as to racial groups was very likely not 'feasible,' because years of discrimination at the plant have insured that nearly all of the upper level employees are white. But there has been no clear showing that differential validation was not feasible for lower level jobs. More importantly, the Guidelines provide . . . [for subsequent validation studies including minority candidates and also of minority groups separately].

"For all these reasons, we agree with the Court of Appeals that the District Court erred in concluding that Albemarle had proved the job relatedness of its testing program and that the respondents were consequently not entitled to equitable relief. . . . Because of the particular circumstances of this case, however, it appears that the . . . prudent course is to leave to the District Court the precise fashioning of the necessary relief in the first instance. During the appellate stages of this litigation, the plant has apparently been amending its departmental organization and the use made of its tests. The appropriate standard of proof for job relatedness has not been clarified until today. Similarly, the respondents have not until today been specifically apprised of their oppor-

tunity to present evidence that even validated tests might be a 'pretext' for discrimination in light of alternative selection procedures available to the company. We also note that the Guidelines authorize provisional use of tests, pending new validation efforts, in certain very limited circumstances. . . . Whether such circumstances now obtain is a matter best decided, in the first instance, by the District Court. That court will be free to take such new evidence, and to exercise such control of the company's use and validation of employee selection procedures, as are warranted by the circumstances and by the controlling law."

The Equal Employment Opportunity Act of 1972 brought federal, state and local governments under the provisions of Title VII. This intensified the questions with respect to "merit" hiring—something governmental units believed they were already accomplishing by written civil service examinations and other hiring requirements. Following the *Griggs* decision, several Circuit Court decisions struck down specific civil service examinations, height and weight requirements, etc., for policemen, firemen, teachers or other government employees because these requirements were shown to have a disparate effect on the employment opportunities of minorities and/or women and were not demonstrably related to job performance (see pages 51 to 55, Appendix A, for excerpts from some of these decisions).

For several years the Equal Employment Opportunity Coordinating Committee (EEOCC)—which consists of the Secretary of Labor, the Chairman of the EEOC, the Attorney General, the Chairman of the U.S. Civil Service Commission, and the Chairman of the U.S. Civil Rights Commission—has been trying to develop a set of uniform guidelines on employee selection procedures. Draft documents have been circulated for comment, but uniform guidelines have not as yet been agreed upon. Some knowledgeable people believe that the Supreme Court's decision in *Albemarle Paper* may break the deadlock. Meanwhile, they point out that the EEOC's Guidelines continue to be given "great deference" by the courts, regardless of the employment setting or even of whether Title VII itself is directly involved.

Seniority — Old Issues and Two New Dilemmas

By the end of 1972 it was already well established that the federal courts did not regard departmental or job-progression line seniority systems that perpetuated past discriminatory patterns as "bona fide" seniority systems under Title VII. Court-decision-watchers noted that the remedies provided by various courts to minorities who had previously been "locked in" to undesirable jobs by such systems included: (1) the right to transfer to jobs they are qualified to perform in other departments or job-progression lines and to move up those new lines as rapidly as openings occur for which they are qualified; (2) the use of their plantwide seniority in determining their "rightful place" for transfer and promotion purposes; (3) if the initial transfer must be to a lower-paying job in the more desirable progression line, the maintenance of their pay at their old job's wage rate ("red-circling") until they work up to jobs that pay at least as much in the new job-progression lines; and (4) the right to "two bites at the apple," i.e., to return to their old jobs if they do not like their first new assignments—and then to transfer out once more within a reasonable period of time. By the end of 1973 backpay was also being added as a necessary part of the remedy (see Exhibit 2).

But special seniority and transfer provisions for minorities are admittedly cumbersome to administer, especially in very large plants. Following the lead of the steel and trucking industries (see page 9), other companies and unions whose contracts did not already include such provisions

have begun to switch to plantwide seniority provisions; to open up their job-progression lines by allowing greater transfer and promotion rights to all employees; and to post all job openings to make sure everyone in the plant is aware of them.

By acting affirmatively on their own, both the companies and the unions hope to reduce, if not totally eliminate, the possibility of class-action suits and backpay awards for Title VII discrimination. (Some nonunion companies report taking similar actions to provide hourly employees with promotion and transfer opportunities in a broader, more objective, and more openly administered internal labor market. A substantial number of companies now say they have instituted similar procedures for their exempt employees, too.)

The matter of seniority in relation to Title VII almost seemed resolved. But then came the recession, and companies began to lay off employees. Suddenly a whole new problem area was recognized. Some companies had hired very few minorities or women for certain job categories until they undertook affirmative action recruiting and hiring programs in the late 1960's. Now these companies needed to reduce their work forces in those job categories. If they followed the rule of inverse plantwide seniority, as their collective-bargaining agreements generally required, the layoffs would have a disproportionate effect on the newly hired, protected groups. Was this permissible under Title VII which, in section 703 (h), includes an exception for actions taken "pursuant to a bona fide seniority or merit system"?

The initial court case on the issue involved a layoff that cut very deeply into the work force, going all the way back to individuals hired in 1951.[5] The District Court noted that the collective-bargaining agreement gave the all-white work force that had been hired throughout the 1950's and the early 1960's recall rights to their jobs. If this agreement were followed, it might well be a decade before there were any minorities working in the plant again. The District Court held this to be illegal and tried to fashion a remedy to correct the situation at the employer's expense without injuring any individual white employee's seniority rights. The case is, however, on appeal. Meanwhile, court-decision-watchers note that two circuit courts have held that a plantwide seniority system is "a bona fide seniority system" and that layoffs made in accordance with such a system are lawful under Title VII.[6]

As the recession deepened precipitously, civil rights, minority and women's advocacy groups became seriously concerned that whatever gains had been made since the late 1960's toward equal employment opportunity would be wiped out by "last in-first out" layoffs. They urged the EEOC to issue guidelines on the subject, generally along the lines of a memorandum issued by Eleanor Holmes Norton, Chairperson of the New York City Commission on Human Rights.

Essentially, employers and unions would be called upon—in lieu of making seniority layoffs that would have a disparate impact on minorities and/or women—to adopt other cost-cutting or production-reducing alternatives that would have less of an adverse effect on the protected groups. For example, the problem might be solved by attrition, elimination of overtime, postponement of wage and benefit increases, rescheduling vacations, sharing the work through shorter work days or shorter work weeks, rotating layoffs, temporarily shutting down the entire plant, etc. The EEOC did draft some guidelines, but decided not to issue them until it had consulted with the EEOCC, the federal coordinating body on nondiscrimination matters. While the other EEOCC members agreed that guidelines were needed, they disagreed on their content. These guidelines, therefore, are currently in limbo. Nonetheless, the discussion has served to focus attention on the problem, and a number of local unions and employers have worked out special arrangements

[5] *Watkins v. United Steelworkers of America Loc. 2369*, D.C. E.D. La., 369 F. Supp. 1221 (1974). The Circuit Court has now reversed the decision.

[6] *Waters v. Wisconsin Steel Works of Int. Harvester Co.*, U.S. Court of Appeals, Seventh Circuit (Chicago) 502 F. 2d 1309 (1974), and *Jersey Cent. Pow. & Lt. Co. v. Local Un. 327, etc. of I.B.E.W.*, U.S. Court of Appeals, Third Circuit (Philadelphia) 508 F. 2d 687 (1975).

Exhibit 9

Constructive Seniority v. Bona Fide Seniority?

"In seeking application-date seniority for members of class 3 (black applicants who applied for OTR [over-the-road driver] jobs before January 1, 1972) appellants ask us to take a giant step beyond permitting job competition on the basis of company seniority. They ask us to create constructive seniority for applicants who have never worked for the company. Granting that the black OTR applicants who were rejected on racial grounds suffered a wrong, we do not believe that Title VII permits the extension of constructive seniority to them as a remedy. Section 703(h) . . . provides:

'Notwithstanding any other provision of this title it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.'

"The discrimination which has taken place in a refusal to hire does not affect the bona fides of the seniority system. . . . Facing this problem in Local 189, Judge Wisdom wrote:

'It is one thing for legislation to require the creation of *fictional* seniority for newly hired Negroes, and quite another thing for it to require that time *actually worked* in Negro jobs be given equal status with time worked in white jobs. . . . [C]reating fictional employment time for newly-hired Negroes would constitute preferential rather than remedial treatment.

* * *

'No stigma of preference attaches to recognition of time actually worked in Negro jobs as the equal of white time. . . . We conclude . . . that Congress exempted from the anti-discrimination requirement only those seniority rights which gave white workers preference over junior Negroes.'

". . . We are guided by his reasoning here. The district court did not abuse its discretion in refusing to create constructive seniority for black OTR applicants who were rejected as a result of Bowman's discriminatory policy."

—Excerpts from the decision of the U.S. Court of Appeals, Fifth Circuit (New Orleans), *Franks v. Bowman Transportation Company*, 495 F. 2d 398 (1974). The Supreme Court has agreed to review this decision.

to reduce or eliminate the need for seniority layoffs.[7]

While recognizing the appropriateness of local negotiations to deal with any troublesome matter, national labor leaders stress that it is really employers' past hiring practices, which by law are beyond union control, and not seniority rules that are giving rise to the present problem, so employers should be held responsible.

Meanwhile another case involving seniority has been making its way up through the federal courts. The Supreme Court has now agreed to review the case of *Franks v. Bowman Transportation Company*, a case in which both the District Court and the Circuit Court have refused to create "constructive seniority," i.e., seniority dating back to the exact dates individual applicants were denied employment on racial grounds (see Exhibit 9). Court-decision-watchers believe this case is a crucial one in the development of the whole line of reasoning with respect to what does and does not constitute a "bona fide" seniority system under Title VII. They note that, unlike some of the cases with respect to layoff and recall, in this case it is the very individuals who were discriminated against—not other members of the same class—who are seeking constructive seniority back to the dates they personally were refused employment.

[7] See David Hershfield, "Reducing Personnel Costs During Recession," *The Conference Board RECORD*, June, 1975, pp. 20-22.

Exhibit 10

Extended Mandatory Maternity Leave = Sex Discrimination

"This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. . . .

"By acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms. . . . [T]he Due Process Clause of the Fourteenth Amendment requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's constitutional liberty. . . ."

* * *

". . . The arbitrary cut-off dates embodied in the mandatory leave rules before us have no rational relationship to the valid state interest of preserving continuity of instruction. As long as the teacher is required to give substantial advance notice of her condition, the choice of firm dates later in pregnancy would serve the boards' objectives just as well, while imposing a far lesser burden on the women's exercise of constitutionally protected freedom.

"The question remains as to whether the fifth and sixth month cut-off dates can be justified on the other ground advanced by the school boards —the necessity of keeping physically unfit teachers out of the classroom. . . .

". . . [T]he provisions amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing. There is no individualized determination by the teacher's doctor—or the school board's—as to any particular teacher's ability to continue at her job. The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary."

* * *

". . . While the regulations no doubt represent a good-faith attempt to achieve a laudable goal, they cannot pass muster under the Due Process Clause of the Fourteenth Amendment, because they employ irrebuttable presumptions that unduly penalize a female teacher for deciding to bear a child."

* * *

". . . For similar reasons, we hold the [prohibition against returning until the infant is] three months' provision of the Cleveland return rule unconstitutional."

—Excerpts from the decision of the Supreme Court of the United States, *Cleveland Board of Education v. Lafleur* and *Cohen v. Chesterfield County School Board, et al.*, 414 U.S. 632 (1974).

Sex Discrimination and Employee Benefits

In 1972, the EEOC had issued amended Guidelines on Discrimination Because of Sex.* But some employers felt the Commission had gone too far, so they declined to follow certain provisions until they had been tested in the courts. The most controversial parts of the Guidelines deal with employee benefits. The major controversy has centered around maternity leaves and benefits, but there has also been a controversy brewing with respect to pension benefits and life insurance benefits.

The Supreme Court, in 1974, held that extended mandatory maternity leave provisions for teachers violated the Due Process Clause of the Fourteenth Amendment (see Exhibit 10). Most court-decision-watchers felt that anything that was held to be sex discrimination under the Constitution was also likely to be regarded as sex

* See Appendix B in Report No. 589.

Exhibit 11

Is Pregnancy a Temporary Disability under Title VII?

"Liberty Mutual provides its employees with an income protection plan. The plan is a fringe benefit and provides employees with the payment of income during periods of disability. . . . Liberty Mutual, however, does not pay any benefits under the income protection plan for disability due to pregnancy or for any disability related to pregnancy. . . .

"Liberty Mutual maintains that Title VII does not require it to include pregnancy benefits in the income protection plan. . . . Appellant feels that [Geduldig v.] Aiello is dispositive of the case before us. We . . . disagree with the appellant.

"Geduldig v. Aiello involved the question of whether there was sex discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. Here we are involved with the question of whether there was discrimination in violation of Title VII of the Civil Rights Act of 1964. In this posture our case is one of statutory interpretation rather than one of constitutional analysis. On this distinction alone we believe appellant's reliance on Aiello is misplaced."

* * *

"To effectuate the goals of Title VII Congress created the EEOC. . . . As an agency, the EEOC was given the power by Congress to issue regulations or guidelines that would indicate what are or are not proscribed discriminatory practices. These guidelines are the agency's interpretation of the statute. When faced with statutory construction problems, courts have generally held that the guidelines are entitled to great deference. . . .

"The guidelines we deal with here prohibit an employer from discriminating between men and women with regard to employment policies and fringe benefits."

* * *

". . . Appellant has not shown any evidence in light of the legislative history that would indicate that the guidelines are inconsistent with any congressional intent. A study of the legislative history of the Act does not show any intent other than to strike at the broad spectrum of discrimination.

"We are not persuaded by appellant's argument that because the guidelines in question were issued in 1972, they should not be given our deference. The EEOC as the agency charged with the responsibility of administering the Act, has issued the guidelines to keep pace with changes in society's attitudes. This evolutionary process is a necessary function of our legal system—a system that must remain flexible and adaptable to ever-changing concepts of our society. . . .

"We feel that the legislative purpose of the Act is furthered by the EEOC guidelines and that the guidelines are consistent with the plain meaning to the statute. Mindful that the guidelines are interpretive rules, we will give them our deference as required by Griggs v. Duke Power Co. . . .

"Under the pertinent guidelines, it is discriminatory to treat pregnancy differently from other temporary disabilities. . . . Liberty Mutual expressly excludes all pregnancy disabilities from coverage under its plan while at the same time covers all other disabilities except those voluntarily inflicted.

"Appellant, in justification of this policy, argues that because pregnancy is voluntary and illnesses are not, pregnancy can be excluded from its income protection plan. We disagree. Voluntariness is no basis to justify disparate treatment of pregnancy. There are a great many activities that people participate in that involve a recognized risk. Most people undertake these activities with full knowledge of the potential harm. . . .

". . . Even if we were to accept appellant's argument of voluntariness, we find that some voluntary disabilities are covered while one voluntary disability that is peculiar to women is not so covered. Either way we find no support for appellant's argument. Moreover, pregnancy itself may not be voluntary. Religious convictions and methods of contraception may play a part in determining the voluntary nature of a pregnancy. . . .

"Appellant next contends that the plan covers only those disabilities arising from sickness, and since pregnancy is not a sickness it is properly excluded from coverage. Again we disagree. We believe that pregnancy should be treated as any other temporary disability. Employers offer disability insurance plans to their employees to alleviate the economic burdens caused by the loss of income and the incurrence of medical expenses that arise from the inability to work. A woman, disabled by pregnancy, has much in common with a person disabled by a temporary illness. They both suffer a loss of income because of absence from work: they both incur medical expenses; and the pregnant woman will probably have hospitalization expenses while the other person may have none, choosing to convalesce at home."

* * *

"Under Liberty Mutual's plan nearly all disabilities are covered. We believe that an income protection plan that covers so many temporary disabilities but excludes pregnancy because it is not a sickness discriminates against women and cannot stand.

"Appellant also contends that the plan does not violate Title VII because of the company's legitimate interest in maintaining the financial integrity of the plan.

"Appellant has offered no statistical information from which we could conclude that the increased cost for pregnancy benefits would be 'devastating.' We do realize that there would be an increased premium. However, we are not convinced that integrity of the plan would be jeopardized.

"Giving our deference to the EEOC guidelines, we agree that cost is no defense under Title VII to this particular issue. . . .

"Appellant advanced several other arguments to support its contentions, but we find them wholly without merit. The company's policy is neutral on its face but treats a protected class of persons in a disparate manner. This is precisely what Title VII intends to strike down. . . .

"We conclude that Liberty Mutual's income protection plan violates Title VII of the 1964 Civil Rights Act by excluding pregnancy benefits from coverage while including other kinds of temporary disabilities."

* * *

". . . Appellant's maternity leave policy, requiring all women to return to work within three months [of delivery] or be fired, penalizes women because of a physiological condition found only in their sex. There is no leeway under this leave policy to ascertain individual capabilities or characteristics.

". . . We believe that a leave policy that in essence operates as two distinct policies, one affecting only women, cannot stand under Title VII."

—Excerpts from the decision of the U.S. Court of Appeals, Third Circuit (Philadelphia), *Wetzel v. Liberty Mutual Insurance Company*, 511 F. 2d 199 (1975). The Supreme Court has agreed to review this decision.

discrimination under Title VII, because the statute so much more explicitly forbids this type of discrimination. Accordingly, they checked to be sure their own company's maternity-leave provisions were not arbitrary, but were tailored to their true business planning needs, as well as to the needs and physical condition of the individual.

But the question of whether maternity leaves needed to be paid leaves is still not finally settled. The EEOC Guidelines say:

"Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment."

However, some companies feel pregnancy is a matter of choice, and that they should not be obligated to provide any paid maternity leaves. Others concede that any *illness* related to pregnancy should be covered by their employee-benefit plans, but believe that *normal* pregnancy and delivery is "neither a sickness nor an accident" and, therefore, should not be covered under their paid sickness and accident leave provisions.

The first case related to the matter that reached the Supreme Court did not involve Title VII.[8] It dealt with whether, under the Equal Protection Clause of the Fourteenth Amendment to the Constitution, a state's disability insurance program is required to provide benefits to those whose disability is attributable to *normal* pregnancy and delivery. The Court held that California is free to decide what risks it will and will not cover, and how adequately it will do so, in its self-supporting insurance program; the exclusion of normal pregnancy and delivery does not violate the Constitution.

At first a few court-decision-watchers thought this Supreme Court decision might lead to similar rulings under Title VII, but most doubted it. Once again they pointed out that Title VII is much more explicit than the Constitution; sex discrimination with respect to "compensation, terms, conditions, or privileges of employment" is expressly prohibited by the statute. Since the *Aiello* decision, two Circuit Courts have specifically ruled that it is not controlling in Title VII actions. One Circuit Court has explicitly approved the provisions of the EEOC Guidelines (see Exhibit 11). The Supreme Court has now agreed to review that decision.

Some major companies now do provide paid maternity leaves. However, because of the considerable expense this would involve in their particular situations, many others have indicated that they are waiting. They say they will comply with whatever the Supreme Court ultimately rules on the matter. Some are even placing funds in escrow to cover their potential liability for paid maternity leaves back to March 31, 1972, the date on which the EEOC's amended Guidelines on Discrimination because of Sex were issued.

The matter of pension benefits and life insurance benefits is still up in the air. The EEOC guidelines call for equal benefits for the two sexes, regardless of cost differences; but the Sex Discrimination Guidelines issued by the Office of Federal Contract Compliance (see page 30) permit either equal benefits or equal costs. A problem arises because women, as a group, live longer than men, as a group. Therefore, based on the actuarial tables currently used, it is more expensive to provide all female employees with the same monthly pension benefit provided to men—and less expensive to provide the women with life insurance coverage. This is another area in which the EEOCC says it is trying to arrive at uniform guidelines. The court cases dealing with these matters are still at the district court level, so court-decision-watchers expect it will be at least two years before the matter is finally settled.

The Validity of Performance Appraisals

Generally speaking, supervisory ratings have been assumed to be accurate, objective assessments of individual job performance. As a result, most companies have used such ratings as one of the major criteria on which to base various personnel decisions, especially for nonunion employees—deciding who should get pay increases, promotions, transfers, demotions, layoffs, terminations, etc. Similarly, such ratings have been among the major criteria used in validating employee-selection procedures.

But knowledgeable personnel psychologists have long been aware that the appraisal of individual job performance by supervisors is a tricky business at best. They say that many safeguards and precautions need to be built into the performance-appraisal system to ensure valid and reliable ratings which are free from discriminatory bias.

The EEOC Guidelines on Employee Selection Procedures (see Appendix B in Report No. 589), which were issued in 1970, specifically call for validation of employee selection procedures in terms of "important elements of work behavior

[8] *Geduldig v. Aiello*, 417 U.S. 484 (1974).

which comprise or are relevant to the job or jobs for which candidates are being evaluated." While permitting the use of supervisory ratings, the Guidelines include a special warning about them "in view of the possibility of bias inherent in subjective evaluations." Thus companies have been aware for several years that the supervisory ratings they use in formal validation studies are expected by the EEOC to be directly related to the performance requirements of specific jobs—not to be assessments of individuals in the abstract—and are also to be very carefully arrived at.

Court-decision-watchers note that the federal courts have also been following the same line of reasoning in examining performance appraisals used for purposes other than test validation. Whenever the application of performance appraisal data has an adverse effect on some group protected by Title VII, the court looks to how the ratings have been made. If the ratings have not been related to observable, objective standards of work performance—or if they have not been made in accordance with uniform, carefully specified procedures—then the discriminatory appraisal results have generally been overturned and a revision of the performance-appraisal system required (see Exhibit 12).

Thus, companies are now discovering that, far from being a firm, always-acceptable yardstick against which they can measure the fairness and validity of all their personnel actions, supervisory ratings of performance may themselves sometimes be questioned. If there is an "adverse effect" on a protected group, then the appraisals may well be considered by the courts as "tests" needing validation. One personnel specialist sighed: "They're right, of course. But it really makes life complex. Now nothing stays put. You have to look out for unnecessary disparate impacts *everywhere*—even in your measuring tools."

Exhibit 12

Performance Evaluation as a "Test" Requiring Validation

"Zia is a contractor with the U. S. Atomic Energy Commission at Los Alamos, New Mexico. Zia employs between 900 and 1,100 workers of which about 500 are Spanish surnamed and Indian employees. When the work force had to be reduced, Zia used an employee performance evaluation test given by supervisors and foremen on volume of work, quality of work, job knowledge, dependability and cooperation. The evaluation was made while the employee was working. The appellants were laid off because of their low scores on the evaluations in May and August, 1970.

". . . Before the reduction in work force there were eight Anglos and six Spanish surnamed employees and one Indian in the machine shop. After the reduction, there were seven Anglos and two Spanish surnamed employees. . . . [Also] before the reduction in force there were eighteen Spanish surnamed and fourteen Anglo employees in the ironworkers shop; after the reduction, ten Spanish surnamed and twelve Anglos remained."

* * *

"The Zia Company failed to validate the test according to the EEOC guidelines because it failed to introduce evidence of the validity of its employee performance evaluation test consisting of empirical data demonstrating that the test was significantly correlated with important elements of work behavior relevant to the jobs for which the appellants were being evaluated. Zia's own Performance Evaluation Manual for its raters stated that Volume of Work is:

'. . . the volume or output of acceptable work considering the job performance standard. The employee's volume is rated according to the average daily amount of acceptable work he has produced during the review period. Don't compare him with employees in higher, lower or different classifications. We all have our good and bad days, so it is important that the rating be based on the average or typical daily output.'

"Zia admits that only one of the evaluators in the machine shop kept records; there were no

other backup records to the performance evaluations which were maintained. As a result of the evaluations, reductions in force were accomplished late that summer and early fall.

"The machine shop employees were evaluated in May, 1970 by Thomas, Pickett and Barrows. The ironworkers unit was evaluated in August, 1970 by its superintendent. The night foreman of the machine shop, Pickett, kept private records but he only observed the day workers for about half an hour per day. Pickett testified that he made the best evaluations he could but that the men he graded did not work for him and it was a 'slim judgment.'

"Mr. Thomas, the machine shop supervisor, rated the machine shop employees. He was absent from the plant for about half of the time for about four months before the evaluation took place in May, 1970. When he was at the plant he observed the employees and he based his evaluation on their work and from talking to the inspector and engineer assigned to the machine shop. It is clear that the evaluations were based on the best judgments and opinions of these evaluators but were not based on any definite identifiable criteria based on quality or quantity of work or specific performances that were supported by some kind of record.

"The test was not validated according to Zia's own guidelines in that the evaluators did not grade the employees according to their average daily amount of acceptable work produced during the review period. Therefore, the test was based almost entirely on their subjective observations."

* * *

". . . Zia contends that . . . the Order . . . was complied with; the test was self-validating in that they measured job related criteria by evaluating the employee's actual performance on the job.

"This contention has no merit. . . . The test was based primarily on the subjective observations of the evaluators, two out of three of whom did not observe the workers on a daily basis."

—Excerpts from the decision of the U.S. Court of Appeals, Tenth Circuit (Denver), *Brito v. Zia Company*, 478 F. 2d 1200 (1973).

The Processing of Complaints by the EEOC

The scope of Title VII was broadened in 1972 to cover virtually all *employers*, both public and private, in all sectors of the economy. Since then there have been EEOC complaints and also federal court cases charging violations of Title VII by many different kinds of employers—by local and state government agencies, by public and private colleges and universities, by school systems, by hospitals, and by various other nonprofit organizations—as well as by business enterprises, unions and employment agencies.[9] And over the years individuals seeking work or already working in all sectors of the economy have become increasingly aware of this strong federal law prohibiting discrimination in employment because of race, color, religion, sex, or national origin. As a result, the number of complaints filed with the EEOC has grown in each successive year.

Unfortunately, despite significant increases in the funds allocated to the EEOC in successive years, the administrative machinery and staff available at this agency have not proved adequate to handle the increasing caseload. A serious backlog of complaints has built up.

The EEOC has adopted several different approaches to try to deal with the problem. For example:

(1) The issuance of "right to sue" letters to individuals, even though the EEOC has not been able to attempt conciliation of their complaints.

(2) A "track system" whereby significant Commission resources are focused on investigating and conciliating broad charges of discrimina-

[9] Federal government employees are also covered by Title VII, as amended, but their complaints of discrimination are handled by the Civil Service Commission, rather than the EEOC. The Commission's actions and rulings are then subject to federal court review, but until recently the whole case was not being heard afresh by the court.

tion against a limited number of major employers and unions. The Commission indicated this would consolidate the investigation of many similar complaints; it also hoped that the broad settlements arrived at would be an important impetus to changes in discriminatory patterns and practices by many other employers and unions, thus reducing the need for complaints.

In the fall of 1973 General Motors, Ford, General Electric, Sears Roebuck and the International Brotherhood of Electrical Workers were all notified that they were on Track I, charged with job discrimination "on a national scale."[10] Track II was reserved for broad charges against certain major regional employers and unions. And Tracks III and IV were for the handling of multiple and single charges against all other employers and unions, with Track IV investigations being limited to the issues raised in the single charge. Allocations of Commission resources have been roughly based on this classification system.

(3) An agreement, if federal standards are applied, to give greater weight to the findings of some of the state and local nondiscrimination agencies to which the EEOC defers the initial handling of complaints.

Despite—some even say because of—such efforts, the backlog of unprocessed EEOC complaints stands at over 90,000 as of June 30, 1975. (The EEOC has received over 60,000 complaints in this fiscal year and has processed almost an equal number.)

[10] Other unions are also involved because they have contracts with the named employers. The investigations in support of the charges have, like those preceding the AT&T consent agreement, been both very broad in scope and very detailed. As of June, 1975, all five of these Track I cases are still pending.

Recent Developments under Executive Order 11246, as Amended*

UNDER THIS Executive Order, each contracting agency in the Federal Government has been given primary responsibility for obtaining compliance by specified types of government contractors with the rules, regulations and orders relating to employment discrimination issued through the Office of Federal Contract Compliance (OFCC) in the Department of Labor. Revised Order No. 4, which calls for written affirmative action plans, including goals and timetables, is the primary order to be enforced. But the scattering of compliance responsibility has reportedly led to great unevenness in enforcement efforts. Some federal agencies have apparently been much stricter in their requirements on contractors than others. Also, companies that are in several different businesses are subject to review by more than one agency. Sometimes they have faced very annoying and time-consuming problems because of conflicting instructions.

To try to remedy the situation, and also to take into account what the government had learned in compliance efforts to date, the OFCC has issued some new regulations. A further revision of Revised Order No. 4 was issued effective July 12, 1974. On the same date, Revised Order No. 14, establishing a standardized compliance-review procedure, and including a standardized compliance review report, was also issued in completed form (see Appendix B, pages 88 to 96 for the text of Revised Order No. 4 and pages 96 to 109 for Revised Order No. 14).

The primary change in the 1974 version of Revised Order No. 4 is the degree of specificity that is required in the work force and utilization analyses. The representation of protected groups in the work force is now analyzed by job titles within departments at each establishment. Lines of progression, usual promotion sequences, and job families or disciplines must also be indicated; and the wage rate or salary range for each job title must now be given. Then any underutilization of minorities or women by job group ("defined as one or a group of jobs having similar content, wage rates, and opportunities") and by organizational units is noted so that goals, timetables and affirmative action commitments can be specified.

Parallel checks on these analyses are provided for in the 1974 version of Revised Order No. 14, together with a detailed outline of possible affirmative actions the compliance review officer is expected to consider in determining whether the contractor is making a good-faith effort to correct "affected class" situations and achieve reasonable goals and timetables.[1]

In commenting on the specificity of the new OFCC regulations, one affirmative action officer said, "They've got us. There's just no hiding place left." Another said, "These new regulations will generate more paper than either we or the government can possibly digest. It's bound to be counterproductive to managing our EEO effort." But a commentator with a longer-range perspective said:

"Actually the government is requiring us to do precisely the kinds of detailed critical analyses

* For the full text, see Appendix B of Report No. 589.

[1] In March, 1975 the OFCC also issued for comment proposed regulations formalizing its rules for dealing with "affected class" situations, including the provision of back-pay. As of June 30, these proposed additions to Revised Order No. 14 had not yet been formally approved.

of our human resource needs and work-force availabilities that we ought to be doing as a matter of self-interest. The minimal amount of extra work that is needed to meet their special procedural requirements is a small price indeed to pay for the education we are all receiving. Voluntarily or not, we are now learning how to manage human resource systems."

As noted below, there has been considerable controversy about the release of affirmative action plan information by the OFCC (see page 32). In January, 1973, the agency issued regulations governing the examination and copying of OFCC documents under the Freedom of Information Act (see Appendix B, pages 109-110, for the text of these regulations. To protect the confidentiality of their data, some companies say they have, as permitted by Revised Order No. 14, been using alphabetic or numeric codings or index numbers to indicate pay data on the reports they must submit to the OFCC. They have been supplying more detailed pay information only during the on-site reviews.

Other Routes to Federal Court Action

THOSE INTERESTED in achieving nondiscrimination in employment promptly have felt very frustrated by the administration of both Title VII and Executive Order 11246. They regard Title VII as extremely slow and cumbersome. As for the Executive Order, even the General Accounting Office has been highly critical of the OFCC's enforcement. Accordingly, many have sought ways to bypass the existing administrative machinery in order to bring matters directly into the federal courts.

For both individual and class-action complaints of employment discrimination, attorneys have looked for other federal laws and Constitutional provisions under which to bring suit. Among the provisions that they have found can sometimes be used are:

> The Fifth and Fourteenth Amendments to the Constitution (see Appendix B, page 70 for texts).
>
> The Civil Rights Acts of 1866, 1870, and 1871 (see Appendix B, page 70 for texts).

Indeed, informed observers note that the Supreme Court seems to be encouraging just such a course of action (see Exhibit 13). And the same provisions are also being used to lengthen the list of categories or groups protected from employment discrimination, e.g., aliens (see Exhibit 14).

Advocacy and public interest groups have also sought to involve the federal courts in EEO matters on a more systematic basis:

- Under the Freedom of Information Act they have obtained court orders requiring the government to release information from employers' written affirmative action plans which are on file with the OFCC. (Excerpts from such decisions are on pages 66 to 69 in Appendix A.)
- Under the Administrative Procedure Act they have obtained a court order requiring rule making by the Securities and Exchange Commission on the necessary disclosure of EEO information to stockholders of public corporations.[1]
- They have obtained court orders requiring federal administrative agencies to enforce a law or the Executive Order dealing with discrimination in employment.[2] In this connection, it has already been noted that the following additional laws and orders call upon federal administrative agencies to insist upon nondiscrimination in federal employment itself and in various kinds of federally funded activities:

> Title VI of the Civil Rights Act of 1964
>
> Title IX of the Educational Amendments of 1972
>
> The State and Local Fiscal Assistance Act of 1972
>
> The 1973 Amendments to the Omnibus Crime Control and Safe Streets Act

[1] *Natural Res. Def. Coun. Inc. v. Securities & Exch. Com'n.*, D.C., D.C. 389 F. Supp. 689 (1974).

[2] See, for example, *Adams v. Richardson*, U.S. Court of Appeals, District of Columbia Circuit, 480 F. 2d 1159 (1973) with further proceedings in the District Court under the name of *Adams v. Weinberger*, and *Legal Aid Society of Alameda County v. Brennan*, D.C., N.D. California, 381 F. Supp. 125 (1974).

The Comprehensive Employment and Training Act of 1973

Executive Order 11478, Equal Employment Opportunity in the Federal Government

(Texts of the relevant provisions appear in Appendix B.)

As one court-decision-watcher put it: "The federal courts obviously regard nondiscrimination in employment as a public policy matter of the highest priority. They mean business about it, and they expect everyone else to mean business too. All of us—administrative agencies, public and private employers, and unions, too—had better get with it. Failure to act vigorously and promptly is likely to prove very embarrassing and extremely costly."

Exhibit 13

Relationship of the Civil Rights Act of 1866 to Title VII

"Despite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief. '[T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.' . . . In particular, Congress noted 'that the remedies available to the individual under Title VII are coextensive with the indivdual's [sic] right to sue under the provisions of the Civil Rights Act of 1866, 42 U. S. C. § 1981, and that the two procedures augment each other and are not mutually exclusive.' . . . Later, in considering the Equal Employment Opportunity Act of 1972, the Senate rejected an amendment that would have deprived a claimant of any right to sue under § 1981. . . .

"Title 42 U. S. C. § 1981, being the present codification of § 1 of the century-old Civil Rights Act of 1866, . . . on its face relates primarily to racial discrimination in the making and enforcement of contracts. Although this Court has not specifically so held, it is well settled among the federal courts of appeals—and we now join them —that § 1981 affords a federal remedy against discrimination in private employment on the basis of race. An individual who establishes a cause of action under §1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages. . . . And a backpay award under § 1981 is not restricted to the two years specified for backpay recovery under Title VII.

"Section 1981 is not coextensive in its coverage with Title VII. The latter is made inapplicable to certain employers. . . . Also, Title VII offers assistance in investigation, conciliation, counsel, waiver of court costs, and attorney's fees, items that are unavailable at least under the specific terms of §1981."

* * *

"We are satisfied, also, that Congress did not expect that a §1981 court action usually would be resorted to only upon completion of Title VII procedures and the Commission's efforts to obtain voluntary compliance. Conciliation and persuasion through the administrative process, to be sure, often constitute a desirable approach to settlement of disputes based on sensitive and emotional charges of invidious employment discrimination. We recognize, too, that the filing of a lawsuit might tend to deter efforts at conciliation, that lack of success in the legal action could weaken the Commission's efforts to induce voluntary compliance, and that a suit is privately oriented and narrow, rather than broad, in application, as successful conciliation tends to be. But these are the natural effects of the choice Congress has made available to the claimant by its conferring upon him independent administrative and judicial remedies. The choice is a valuable one. Under some circumstances, the administrative

route may be highly preferred over the litigatory; under others, the reverse may be true. We are disinclined, in the face of congressional emphasis upon the existence and independence of the two remedies, to infer any positive preference for one over the other, without a more definite expression in the legislation Congress has enacted, as, for example, a proscription of a §1981 action while an EEOC claim is pending.

"We generally conclude, therefore, that the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent."

* * *

"Since there is no specifically stated or otherwise relevant federal statute of limitations for a cause of action under § 1981, the controlling period would ordinarily be the most appropriate one provided by state law."

* * *

"Petitioner argues that a failure to toll the limitation period in this case will conflict seriously with the broad remedial and humane purpose of Title VII. Specifically, he urges that Title VII embodies a strong federal policy in support of conciliation and voluntary compliance as a means of achieving the statutory mandate of equal employment opportunity. He suggests that failure to toll the statute on a § 1981 claim during the pendency of an administrative complaint in the EEOC would force a plaintiff into premature and expensive litigation that would destroy all chances for administrative conciliation and voluntary compliance.

"We have noted this possibility above and, indeed, it is conceivable, and perhaps almost to be expected, that failure to toll will have the effect of pressing a civil rights complainant who values his § 1981 claim into court before the EEOC has completed its administrative proceeding. [In a footnote the court said, "We are not unmindful of the significant delays that have attended administrative proceedings in the EEOC. . . ."] One answer to this, although perhaps not a highly satisfactory one, is that the plaintiff in his § 1981 suit may ask the court to stay proceedings until the administrative efforts at conciliation and voluntary compliance have been completed. But the fundamental answer to petitioner's argument lies in the fact—presumably a happy one for the civil rights claimant—that Congress clearly has retained §1981 as a remedy against private employment discrimination separate from and independent of the more elaborate and time consuming procedures of Title VII."

—Excerpts from the decision of the Supreme Court of the United States, *Johnson v. Railway Express Agency, Inc.* 95 S Ct. 1716 (1975).

Exhibit 14

Protection for Aliens under the Civil Rights Act of 1866

"Appellants also challenge the district court's decision on Guerra's §1981 claim as a matter of statutory interpretation. . . . They argue that § 1981 is not applicable to aliens. . . ."

* * *

"It is unnecessary to repeat the district court's legislative summary here. We have been unable to detect any significant flaws in the analysis, and we adopt that portion of the district court's opinion as our own. More important, as the district court also noted, the Supreme Court has explicitly indicated that this statute applies to aliens."

—Excerpts from the decision of the U.S. Court of Appeals, Fifth Circuit (New Orleans), *Guerra v. Manchester Terminal Corporation* 498 F. 2d 641 (1974).

Recent Developments under the Age Discrimination in Employment Act of 1967*

Work-Force Reduction Problems

THE EARLY CASES under the Age Discrimination law dealt with hiring practices. But the change in the economic climate has now focused special attention on age discrimination problems associated with reductions in the work force, especially the white-collar work force.[1]

Knowledgeable personnel experts note that layoffs, early retirements, and terminations of older white-collar workers can seem especially tempting to cost-conscious employers. Such employees have usually received virtually automatic salary increases over the years, so they are generally paid considerably more than the younger employees on the same jobs. Yet these older employees are not necessarily more productive—indeed, their skills and knowledge may seem narrow and obsolescent, especially when they are compared to very recent college graduates. Thus, when work-force reductions are needed, the 40- to 65-year-old group can be especially vulnerable.

Nonetheless, carrying over the general line of reasoning about employment discrimination established in *Griggs* to the area of age discrimination, employers are not free to concentrate their layoffs and terminations in the 40 to 65 age group unless they can justify doing so as a matter of business necessity. And—as Standard Oil Company of California learned when it signed a consent agreement to rehire many former employees, and reportedly also to grant them about $2 million in backpay—establishing the business necessity of such an action is not easy to do. Personnel specialists note that all those "good" to "excellent" appraisals of job performance that have been used to justify repeated annual salary increases to virtually all white-collar workers may very well come back to haunt a company when it attempts to prove that very many of its older white-collar employees are really "deadwood."

Another facet of the Age Discrimination Act was highlighted during the 1975 budgetary woes of New York City. One of the suggestions for reducing the municipal payroll was to lower the *mandatory* retirement age. Following consultation with the Department of Labor, which administers the federal law, the idea was reportedly dropped as being clearly illegal. The emphasis was shifted to advising employees that the city would welcome *voluntary* early retirements, especially since quite a number of employees could retire at their current full pay.

The Relationship of the Job to the Essence of the Business

A number of age discrimination cases have questioned the legality of flat age limitations in hiring for jobs such as bus drivers. Court-decision-watchers say that one of the recent cases sheds further light on the meaning of "business necessity," i.e., what is necessary to the safe and efficient operation of the business. They point out that, in addition to concerns for safety per se and for efficiency per se, the courts also appear to be taking into account the closeness of the relationship of the particular job to the essential nature of the particular business. Thus, while the

* For the full text, see Appendix B of Report No. 589.

[1] The jobs of many older blue-collar workers are protected by seniority rights under collective-bargaining agreements; however, most white-collar workers—including professionals and managers—do not have such protection.

Exhibit 15

A Potential Impact on the Essence of the Business

"Similar to the airline industry, the essence of Greyhound's business is the safe transportation of its passengers. Thus we deem it necessary that Greyhound establish that the essence of its operations would be endangered by hiring drivers over forty years of age."

* * *

"[A] public transportation carrier, such as Greyhound, entrusted with the lives and well-being of passengers, must continually strive to employ the most highly qualified persons available for the position of intercity bus driver for the paramount goal of a bus carrier is safety. Due to such compelling concerns for safety, it is not necessary that Greyhound show that all or substantially all bus driver applicants over forty could not perform safely. Rather . . . Greyhound must demonstrate that it has a rational basis in fact to believe that elimination of its maximum hiring age will increase the likelihood of risk of harm to its passengers. Greyhound need only demonstrate however a minimal increase in risk of harm for it is enough to show that elimination of the hiring policy might jeopardize the life of one more person than might otherwise occur under the present hiring practice.

"In an effort to satisfy its burden of proof, Greyhound produced . . . testimony by transportation industry officials, former high-ranking officials of the Interstate Commerce Commission, and Greyhound officers. The testimony of these officials, although persuasive in view of their accumulated experience in the transportation industry, is not of itself sufficient to establish a bona fide occupational qualification. In our view we find more compelling Greyhound's evidence relating to: the rigors of the extra-board work assignments; the degenerative physical and sensory changes in a human being brought on by the aging process which begins in the late thirties in the life of a person; and the statistical evidence reflecting, among other things, that Greyhound's safest driver is one who has sixteen to twenty years of driving experience with Greyhound and is between fifty and fifty-five years of age, an optimum blend of age and experience with Greyhound which could never be attained in hiring an applicant forty years of age or over. This compelling evidence in combination with the general testimony of the transportation industry officials adequately demonstrates Greyhound has a rational basis in fact to believe that elimination of its maximum hiring age will increase the likelihood of risk of harm to the well-being of its passengers and others."

* * *

"Greyhound need not establish its belief to the certainty demanded by the Government and the district court for to do so would effectively require Greyhound to go so far as to experiment with the lives of passengers in order to produce statistical evidence pertaining to the capabilities of newly hired applicants forty to sixty-five years of age. Greyhound has amply demonstrated that its maximum hiring age policy is founded upon a good faith judgment concerning the safety needs of its passengers and others. It has established that its hiring policy is not the result of an arbitrary belief lacking in objective reason or rationale."

—Excerpts from the decision of the U.S. Court of Appeals, Seventh Circuit (Chicago), *Hodgson v. Greyhound Lines, Inc.*, 499 F. 2d 859 (1974). Certiorari denied, U.S. Supreme Court, under the name of *Brennan v. Greyhound Lines, Inc.* 9 FEP Cases 58 (1975).

burden of proof is still on the employer to justify the discriminatory standard, that burden may be much lighter in some cases than in others (see Exhibit 15).

These same experts emphasize that the federal courts do tend to view all employment discrimination cases within the framework of the same principles, and that this same distinction had been

emerging in Title VII cases, too.[2] But personnel specialists have tended to think of all jobs as being part of an interrelated network of assigned duties and responsibilities—the organization—no part of which is truly able to function independently. They have also tended to think of the importance of jobs in terms of their hierarchical level within the organization (or their compensation level) and not in terms of the relationship the jobs bear to the essence of the business. They say this legal concept is a difficult one to become accustomed to.

[2] See, for example, the excerpts on page 33 of Report No. 589 from the decision in *Diaz v. Pan Am. World Airways, Inc.* U.S. Court of Appeals, Fifth Circuit (New Orleans), 442 F. 2d 385 (1971). Certiorari denied, U.S. Supreme Court, 404 U.S. 950 (1971).

Recent Developments under the Equal Pay Act of 1963*

THE EQUAL PAY Act of 1963 calls for equal pay for men and women for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions" within the same establishment. By 1972, the federal courts had already interpreted the law as calling for equal pay for *substantially* equal work.

The Supreme Court decided, in 1974, that, under this law, the term "working conditions" has the limited and precise meaning that it has in the field of job evaluation, i.e., that it encompasses "surroundings" and "hazards" but does not include "time of day worked."[1] Court-decision-watchers noted that the *general* shift differential the company paid was approved under the exception in the law for "a differential based on any other factor other than sex," but that the Court had held that the company could not continue, as a "red circled" exception, an *additional* special base-rate differential it had once paid to *men* for doing inspection work on the night shift. *Women* doing the same job on the day shift were entitled to the same base pay. This seemed like a minor point, but compensation experts noted that it highlighted the fact that, in correcting any inequity under the Equal Pay Act, the company must ordinarily raise the lower rate. The decision was reported to have cost Corning Glass Works over $1 million in backpay.

Following the extension of the coverage of the Equal Pay Act to exempt employees, AT&T found it necessary to sign a consent agreement bringing the initial pay of women promoted to managerial positions up to the initial pay of men who were so promoted. Initial pay had previously been related to past earnings, which were lower for the women. The cost to the company was estimated at $30 million. In light of this, compensation specialists warned that, since companies often negotiated initial hiring rates for professional and managerial jobs, they would be well advised to make sure the salaries negotiated with women were not below those for men doing substantially equal work.

Then, in 1975, a Circuit Court affirmed the requirement of equal pay even though it was under circumstances "in which the men regularly spent a substantial portion of their time performing a type of janitorial work which was not identical to the type of janitorial work which occupied a substantial portion of the women's time.[2] This was another case in which the District Court had noted that it was following the Supreme Court's advice in *Griggs* by giving "great deference" to the Secretary of Labor's regulations interpreting the law.

Several court-decision-watchers commented that it was certainly time for everyone to take all the official interpretations and regulations dealing with nondiscrimination in employment that have been issued by federal administrative agencies very seriously. Apparently the courts will presume they are valid and appropriate unless they can be shown to be erroneously in conflict with whatever law or executive order they are issued under.

* See Appendix B of Report No. 589.

[1] *Corning Glass Works v. Brennan*, U.S. Supreme Court, 417 U.S. 188 (1974).

[2] The U.S. Court of Appeals, Fifth Circuit (New Orleans), per curium decision was made on March 26, 1975, according to the U.S. Department of Labor, but has not as yet been published. It reportedly affirms *Brennan v. Houston Endowment, Inc.* 21 WH Cases 561. The Supreme Court has been asked to review this decision.

New Laws and Regulations

The Rehabilitation Act of 1973, as Amended*

IN 1973, CONGRESS included two sections dealing with employment discrimination in this broader act dealing with federal help for handicapped individuals:

(1) Virtually all government contractors are now required to agree to take affirmative action to employ, and advance in employment, qualified physically or mentally handicapped individuals. Moreover, any handicapped individual who believes a contractor has failed, or refuses, to comply with this requirement may, after using whatever internal review procedure is available, file a complaint with the Department of Labor. (The Department may have his handicap certified.)

(2) Discrimination is also prohibited against an otherwise qualified handicapped individual under any program or activity receiving federal financial assistance.

The Employment Standards Administration of the Department of Labor administers the law with respect to government contractors, and has just announced it expects to publish revised affirmative action regulations in the *Federal Register* which will take into account the recently amended statutory definition of a "handicapped individual." In addition to agreeing not to discriminate against any qualified employee or applicant for employment because of a physical or mental handicap, major government contractors will be required to maintain, but not submit, written affirmative action plans covering such matters as outreach recruiting and accommodation to the physical and mental limitations of applicants and employees. The regulations are not expected to call for goals and timetables. There is, of course, still very little experience with such written plans. But personnel specialists mention the tailoring of physical examinations to specific job requirements, and the gradual provision of ramps and doors wide enough to accommodate wheel chairs, as two types of accommodations they are including in their written plans.

Vietnam-Era Veterans' Readjustment Assistance Act of 1974**

This law, which became effective at the end of 1974, includes a section that requires government contractors to agree to take affirmative action to employ, and advance in employment, qualified disabled veterans and veterans of the Vietnam era. The contractor must also list with the local employment service office all suitable employment openings, and the employment service is required to give these special categories of veterans priority in referrals. Complaints by veterans against contractors may be filed with the Veterans' Employment Service of the Department of Labor. (No written affirmative action plan is required.)

Title IX Regulations***

In late May, 1975, President Ford signed and sent to Congress for final approval the regulations issued by the Department of Health, Education

* See Appendix B, page 84, for the text of the relevant provisions.

** See Appendix B, page 86 for the text of these provisions

*** See Appendix B, pages 110 to 123, for the text of these provisions.

and Welfare under Title IX of the Educational Amendments of 1972. This law calls for nondiscrimination on the basis of sex under federally assisted educational programs and activities. In addition to prohibiting sex discrimination in employment in all such programs, the regulations, with certain limited exceptions, also prohibit sex discrimination in student admission and recruitment and in student participation in programs and activities. Personnel specialists note that the implementation of these regulations is likely to have a profound effect upon the available supply of women qualified to perform jobs of many different kinds in all sectors of the economy.

At the same time the Office for Civil Rights in HEW indicated it planned to stop investigating discrimination complaints from individuals and to concentrate its efforts on searching out broad patterns of bias in institutions. The proposed change is still pending at the present time.

Appendixes

A. Other Excerpts from Federal Court Decisions About Nondiscrimination in Employment

B. Texts of Regulations, as Amended

Provisions from The Constitution of the United States

Civil Rights Acts of 1866, 1870, and 1871

Civil Rights Act of 1964, as Amended

Title VI — Nondiscrimination in Federally Assisted Programs

Title VII — Equal Employment Opportunity

Title IX of the Educational Amendments of 1972, P.L. 92-318 (excerpts)

The State and Local Fiscal Assistance Act of 1972, P.L. 92-512 (excerpt)

Crime Control Act of 1973, P.L. 93-83 (excerpt)

The Rehabilitation Act of 1973, as Amended, P.L. 93-112 as Amended by P.L. 93-516 (excerpts)

The Comprehensive Employment and Training Act of 1973, P.L. 93-203 (excerpts)

Vietnam-Era Veterans' Readjustment Assistance Act of 1974, P.L. 93-508 (excerpts)

Executive Order 11478

Office of Federal Contract Compliance

Revised Order No. 4, Affirmative Action Guidelines

Revised Order No. 14, Standardized Compliance Reviews

Examination and Copying of OFCC Documents

Department of Health, Education and Welfare: Regulations under Title IX of the Educational Amendments of 1972

Appendix A

Other Excerpts from Federal Court Decisions About Nondiscrimination in Employment

THE FEDERAL COURT decisions excerpted in this Appendix are among those considered especially enlightening by various court-decision-watchers. They have helped them to understand how federal judges —particularly those on the circuit courts—are applying the nondiscrimination laws under a variety of circumstances. For convenience, most of these court decisions are arranged by the general category of personnel action that was being challenged, e.g., initial hiring, compensation, discharge. Court-decision-watchers say this type of categorization has proved helpful in directly reminding them of possible problem areas within their own companies. However, they say that, because a common line of reasoning is being applied in all kinds of nondiscrimination cases, it is useful to be aware of what the courts are saying about other kinds of employment discrimination, too.

They also point out that, while many of the court cases to date have dealt with blacks and women, the same interpretations could apply to all other groups protected by Title VII and by the Age Discrimination in Employment Act. (See also Appendix A in Report No. 589.)

Nondiscrimination in Initial Hiring

McDonald v. General Mills, Inc., et al.

Excerpts from the decision of the U.S. District Court, Eastern District of California, 387 F. Supp. 24 (1974).

(These excerpts deal with the reaction of a number of companies to a law suit about sex discrimination in their campus recruiting practices.)

". . . The Sacramento State College [now State University] Graduate Placement Center sent employer recruitment forms to firms which had shown an interest in employment interviews on the campus. These forms contained boxes which could be checked if a firm preferred to interview men or women graduates. Each of the defendants purportedly checked the box which indicated a preference for male graduates. Plaintiff, a female student at Sacramento State, was scheduled to graduate in June, 1970. She and the class she represents allegedly sought to use the Sacramento State Graduate Placement Center during the Spring of 1970, but were supposedly 'deterred from making application for employment and seeking an interview' with representatives of the defendants. Additionally, two defendants allegedly circulated printed recruitment brochures on campus which referred exclusively to employment opportunities for men. Plaintiff claims that such employment practices are sexually discriminatory and are therefore violative of the Civil Rights Act of 1964."

* * *

". . . Since the inception of this action, this court has ordered the dismissal of 10 of the named defendants due to voluntary compliance and settlement: Prudential Insurance; Boise Cascade; Western Electric; The Travelers; Connecticut General; Reliance Insurance; Chubb & Son; Jewel Home Shopping; John Hancock; and General Adjustment."

Hollander v. Sears, Roebuck & Co.

Excerpts from the decision of the U.S. District Court, Connecticut, 392 F. Supp. 90 (1975).

(These excerpts deal only with whether a white male who was not interviewed for a company's Summer Internship Program for Minority Students may bring suit charging racial discrimination under the Civil Rights Act of 1866. The court decided that such a suit was proper and so the case was not dismissed; no decision has yet been made on the merits of the case. But see also *McDonald v. Santa Fe Trail Transp. Co.*, excerpted on p. 65.)

". . . [T]he plaintiff, a white student at Wesleyan University in Middletown, Connecticut, . . . alleges that he was subjected to racial discrimination by the defendant, Sears, Roebuck & Co., as a result of its refusal to consider him for a position in the Sears Summer Internship Program for Minority Students. The defendant has moved to dismiss the action. . . ."

* * *

". . . The defendant's principal claim is that § 1981 does not provide a cause of action for whites who are the

alleged victims of racial discrimination. . . .

"It is true that the statute provides that 'all persons . . . shall have the same right . . . to make and enforce contracts . . . *as is enjoyed by white citizens*. . . .' (emphasis added), but I do not understand this to mean, as the defendant maintains, that only non-whites may sue under § 1981. A review of the relevant legislative history of § 1 of the Civil Rights Act of 1866, 14 Stat. 27 from which § 1981 was ultimately derived provides strong support for the position that the phrase—'as is enjoyed by white citizens'—was not intended to restrict the availability of this cause of action to non-whites."

United States v. Georgia Power Company

Excerpts from the decision of the U.S. Court of Appeals, Fifth Circuit (New Orleans), 474 F. 2d 906 (1973).

(These excerpts deal with an employer's obligation to do outreach recruiting to seek qualified minorities for higher level jobs.)

"Failure or refusal to hire any individual on account of race is expressly prohibited by Section 703 of Title VII. . . . The private plaintiffs claim that this prohibition extends to Georgia Power's practices of (1) word-of-mouth recruiting and (2) recruiting for skilled personnel only at all-white institutions. . . .

"Only 7.2% of the company's labor force was shown to be black, although this race constituted a much larger percentage of the available labor force. In non-laborer jobs, this disparity is even greater. Under word-of-mouth hiring practices, friends of current employees admittedly received the first word about job openings. Since most current employees are white, word-of-mouth hiring alone would tend to isolate blacks from the 'web of information' which flows around opportunities at the company. . . . No business necessity compels the company to continue to rely so heavily on this hiring technique. In fact, it contends it has already taken action to convey news of new openings to blacks by posting job notices on company bulletin boards which can be read by all personnel. Since 92.8% of all personnel likely to see these notices on a regular basis is white, however, this step is patently inadequate. . . ."

* * *

"The built-in headwinds which the present Georgia Power system harbors must be offset by affirmative steps reasonably calculated to encourage black employment and to break through the currently circumscribed web of information. For example, advertisements of openings in newspapers and periodicals accessible to the black communities of Atlanta and other Georgia cities, and public notice that the company is an equal opportunity employer, are common recruiting techniques which should be considered. . . .

"The company's policy of seeking skilled personnel only at white educational institutions is similarly an invidious brake on black employment opportunities for which no business necessity justification was shown. While the company obviously ought not be enjoined to recruit on all college campuses unless it chooses to do so, it also ought not be allowed to continue to restrict its recruitment programs to all—or preponderantly all—white institutions while maintaining such a racially imbalanced work force."

Wetzel v. Liberty Mutual Insurance Company

Excerpts from the decision of the U.S. Court of Appeals, Third Circuit (Philadelphia), 508 F. 2d 239 (1975).

(These excerpts deal with sex discrimination in recruiting, initial hiring, and promotion.)

"Appellant, Liberty Mutual Insurance Company (Liberty Mutual), is a casualty insurance company with offices throughout the country. Both men and women are employed in the claims department of these offices in what the appellant terms a 'technical' capacity. Within its claims department are adjusters and representatives, each of whose basic function is the application of the necessary technical skills to investigate and bring about the proper disposition of claims against the company. While each is an entry level position open to college graduates, the salary of a claims adjuster is considerably higher than that of a claims representative. . . ."

* * *

"Wetzel and Ross were employed as claims representatives in the Pittsburgh office of the company. Both desired the higher paying adjuster's position but were informed by the Company that it was not open to women."

* * *

"The Company historically had employed claims adjusters but the position of claims representatives was not created until sometime in 1965. Of the 3,129 claims adjusters hired between July 1, 1965, and March 17, 1972, only two were women; they were hired after Wetzel and Ross filed their administrative charges. During that same period, 2,329 persons were hired as claims representatives of which 2,302, or 98.84% were women. During each year between 1965-1969, an average of 1,441 adjusters worked for the Company; in none of those years were more than two adjusters women. In 1970, the number of women female adjusters increased to 5 or 0.31% of the 1,645 adjusters employed that year. In 1971, that percentage increased slightly to 2.8%.

"It does not appear that women were any less qualified to become claims adjusters than men. When the Company decided to recruit women claims adjusters in 1971, it found

that of its then existing claims representative force of 600 women, approximately 1/3 were considered qualified to become claims adjusters. Approximately 10% of the claims representatives were offered and accepted the claims adjusters' position.

"This statistical evidence is buttressed by additional documentary evidence. The Company's recruitment brochure describes the position of claims representatives as 'Fit for a Queen.' In contrast, the brochures entitled 'A Management Career in Liberty Mutual's Claims Department,' challenge the applicant with the inquiry, 'Are you the right man?'

"Liberty Mutual's training manual, copyright 1970, is replete with references to pronouns of the female gender.

"The evidence with respect to the Company's promotion policy is just as impressive. Promotions available to female claims representatives were only to positions of supervising claims representative and claims representative supervisor. Claims adjusters, however, could be promoted to those positions and to numerous other positions which could not be achieved without first being an adjuster.

"Between July 1, 1965, and January 18, 1973, the Company had not employed one woman as a branch office claims manager but had employed in the same position between 121 and 142 men annually. During the same period, no more than 9 or 1.65% of all persons employed on an annual basis as claims supervisors were women. Not one woman was promoted to claims supervisor from the ranks of claims representative between July 1965 until the end of 1969. Of the 97 persons promoted to claims supervisor in 1970, only one was a woman. Again in 1971, only one woman was promoted. This statistical evidence is also corroborated by the Company's recruiting brochures. The brochures for claims representatives describe the only advancement opportunities as supervising claims representative and claims representative supervisor. The brochure for claims adjusters refers to the glowing advancement opportunities available to the claims adjuster."

* * *

"The statistics in this case establish the existence of a prima facie case of sex discrimination. The burden thereupon shifted to Liberty Mutual to establish that these statistics were misleading or to establish non-discriminatory reasons for its policies. Despite its assurances that 'good and sufficient reasons for the existence of these statistics, together with a full explanation, will be offered in due course at the proper time, the district court found that Liberty Mutual's response to plaintiffs' motion 'failed to address this burden at all, let alone rebut the Plaintiffs' evidence.' The time for explanation has come and gone. We believe the evidence established as a matter of law the existence of sexual discrimination in violation of Title VII."

AT&T Proposed Supplemental Order

Excerpts from the Supplemental Order proposed by AT&T and the Federal Government in May, 1975 to the AT&T Consent Decree of January 18, 1973. Although both AT&T and the EEOC have signed this order, it has not as yet been approved by the Federal District Court.

(These excerpts deal with what will constitute "good faith efforts" to meet agreed-upon goals. AT&T advises that job classification 6 includes their skilled outside craft jobs; job classification 9 includes their semi-skilled outside craft jobs; and job classification 8 includes their general services skilled craft jobs, such as air-conditioning mechanic, building service mechanic, and boiler operator.)

"VI. COMPLIANCE DETERMINATIONS

"A . . . 2. Appendix B . . . is a list of affirmative actions in job classifications 6, 8 and 9 appropriate to Bell System practices and the procedures and systems established by the January 18, 1973 Decree. A Company shall be in prima facie compliance with respect to its carry forward obligations under this order, or its intermediate targets established pursuant to the January 18, 1973, Decree, whichever are applicable, for women in job classifications 6, 8 and 9, if all actions required by Appendix B have been performed.

"B. If a Company has satisfied the requirements of paragraph A, 2, above, and the Plaintiffs are not satisfied that the Company is in compliance with respect to its carry forward obligations or its intermediate targets established pursuant to the January 18, 1973, Decree, whichever are applicable, for women in job classifications 6, 8 and 9, the burden shall be on plaintiffs to show in rebuttal that:

1. the Company's actions under Appendix B were not performed in a bona fide manner; or

2. the reasons for the failure to attract, place or retain women in these job classifications:

a. were known or should reasonably have been known to the Company; and

b. the Company would have overcome or significantly diminished the problem by the application of countermeasures which were known or should have been known to the Company and which were reasonable in light of sound business practices.

"C. 1. In all job classifications other than 6, 8 and 9, and with respect to male targets in job classifications 6, 8 and 9, a Company will be in compliance with its carry-forward targets, or with the intermediate targets established pursuant to the January 18, 1973 Decree, whichever are applicable, where the Company made 'good faith efforts' to achieve such obligations or targets.

2. For purposes of this subsection 'good faith efforts' are those efforts which a reasonably prudent manager

would have foreseen and undertaken in furtherance of a legal obligation.

3. In determining whether a Company made 'good faith efforts' to achieve carry-forward obligations or intermediate targets the extent of the numerical difference between the obligation or target and the Company's achievement shall normally be considered significant only where the Company failed to achieve 80% of the obligation or target."

* * *

"APPENDIX B

"The following actions shall, if implemented by a Company, constitute prima facie compliance, as provided in Section VI, with such Company's obligations to make good faith efforts to achieve intermediate targets for women in job classifications 6 and 9 and for jobs in job classification 8 designated as non-traditional.[1] Modification to Transfer Bureau, selection, Employment Office, and training procedures shall be implemented by the beginning of the carry-forward period. Recruiting procedures shall be applicable beginning with the carry-forward period where employees or applicants are being sought for vacant positions. Where any Bell Company has in effect, or may in the future have in effect, a posting and bidding system, or other system, the Company's obligations under the Appendix B will be carried out within the procedural framework of such system.

"I. General

The Transfer Bureau and Employment Office serving an establishment shall review quarterly its pending transfer requests[2] and employment applications to determine whether the combined application requests are sufficient to meet projected needs; however, the Transfer Bureau and Employment Office shall review on an on-going basis pending transfer requests[2] and employment applications. If the number of candidates are not sufficient to meet quarterly needs, the Transfer Bureau and Employment Office shall undertake internal and external recruitment efforts, as listed in sections II and III.

"II. Transfer Bureau

A. Recruiting

1. survey the interest of female employees, identify methods to increase applications, and take steps designed to implement these methods, including the following steps;

2. develop 'living witness' recruiting techniques using females who are employed in job classifications 6, 8 and 9;

3. develop, use and publicize visual aids specially designed to attract females to apply for jobs in job classifications 6, 8 and 9;

4. conduct where geographically feasible and internally publicize tours for female employees of plant training schools applicable to job classification 6, 8 and 9;

5. develop recruiting literature (*e.g.*, posters and handouts) specifically designed to encourage female employees to transfer to jobs in job classifications 6, 8 and 9;

6. explain the operation of the Transfer Bureau and/or job posting and bidding procedures. Appropriate transfer request forms and/or sample bid letters will be distributed at the conclusion of each session under 2, 3, and 4, above;

7. place supplies of transfer request forms on or near bulletin boards or other appropriate locations so that employees need not go to their supervisors for them;

8. inform employees of projected openings or actual opening in job posting and bidding companies by job title and locations;

9. inform employees who have requested transfer to a job in job classifications 6, 8 or 9 of the other jobs within that classification, provide copies of the job briefs and offer to provide counseling;

10. inform female employees who file transfer requests for job classification 10 of the availability of jobs in job classifications 6, 8 and 9;

11. Where a Company's tuition aid program includes training for jobs in job classifications 6, 8 and 9, such Company will inform and encourage female employees to seek training which qualifies for such aid.

B. Administration

1. assign to a specific person or persons in the Transfer Bureau the duty under 4.2 of the Model Upgrade and Transfer Plan of reviewing less than satisfactory performance ratings to determine whether such ratings are reasonable and would adversely affect performance on the requested jobs;

2. provide the Transfer Bureau with complete and timely (at least monthly) allocation of opportunties reports against which deficiency notations may be checked;

3. the Transfer Bureau shall receive all requisitions and note the proper deficiencies;

4. transfers will be concluded in as expeditious manner as possible, needs of the business permitting; if the transfer cannot be concluded within 60 days, the supervisor will justify in writing the delay to the Transfer Bureau;[3]

5. if a vacancy occurs and there is no transfer request on file from an appropriate deficient or underutilized group member for the job at the location;

"[1] Job Classification 8—each Company shall furnish Plaintiffs a list of jobs in the job classification 8 designated as non-traditional."

"[2] In posting and bidding companies this will include a comparable list called 'Available Qualified Candidates.'"

"[3] In posting and bidding companies in accordance with contractual provisions, successful candidates will be released to assume their new positions in a reasonable period of time."

a. the Transfer Bureau shall canvass those persons who filed requests for the same job within the normal area of consideration.[4]

b. canvass those persons who are qualified and who filed requests for other jobs in the same job classification within the normal area of consideration.[4]

c. subsequent canvasses will exclude only those persons requesting exclusion.

Notations will be made on an individual's transfer request acknowledging the results of the canvass or in the case of posting and bidding companies on the 'Available Qualified Candidates' file.

C. Selection

1. During the period of priority placement of deficient groups pursuant to paragraphs I, B. 2(a) and 3, of this supplemental order, for those jobs for which the department makes the selection, the list forwarded by the Transfer Bureau to the department in filling a requisition shall contain only qualified candidates from the deficient groups in accordance with the priorities established in sections I, B, 1-3 of the supplemental order if available. The department shall select from the list so long as candidates meeting the criteria of I, B, 1, a-d, or those persons who in 1974 met the criteria of paragraph I, B. 1 a-d, are on the list. Otherwise, where paragraph B, 3, applies, the department may select from other than the list, using the same criteria, a member of the same race, sex, ethnic group, subject to priority placement;

2. When the period of priority placement of deficient groups pursuant to paragraphs B, 2 and 3, of this supplemental order is not in effect, for those jobs for which the department makes the selection, all selections of persons not on the list of candidates supplied by the Transfer Bureau shall be justified in writing to the Transfer Bureau. A copy of this justification shall be sent to the immediate superior of the person making the justification, and the superior shall initial and retain that copy. A specific person or persons in the Transfer Bureau shall be assigned the duty of verifying and evaluating the reasons set forth in the justification. If the evaluation results in a determination that the selection was not justified the Transfer Bureau shall refer to the EEO Coordinator for corrective action. A record shall be maintained of this corrective action;

3. Once a list of candidates has been supplied to the department, withdrawal or hold on a requisition shall be treated in the same manner as a selection from other than the list. (Appendix B, II, C, 2.)

"III. Employment Office

A. Recruiting

1. Use visual aids together with sample or demonstration equipment to expose applicants to jobs in job classifications 6, 8 and 9;

2. recruit from high school and accredited trade school graduating classes, participate in job fairs and conduct seminars and conferences for teachers and guidance counselors informing them of the courses of study which will best fit students for telephone employment, emphasizing the need to educate students in non-traditional courses, *e.g.*, females in shop courses;

3. institute "living witness" programs in all phases of recruitment;

4. integrate recruiting for job classification 6, 8 and 9 into the employee recruiting program;

5. engage in specialized recruiting for job classifications 6, 8 and 9 through ordinary media channels;

6. make substantial recruiting contacts with likely non-traditional sources, *e.g.* military bases and the groups listed in the Resource Directory (Model Affirmative Action Plan, Exh. 7);

7. conduct tours of the plant training facilities for employment interviewers where geographically practicable;

8. confer with local state employment service officials to emphasize the Company's interest in securing applications for job classifications 6, 8 and 9.

B. Administration

1. Maintain information supplementing the job briefs on job duties in job classifications 6, 8 and 9 (such information will be available for review by any appropriate collective bargaining representative);

2. provide the Employment Office with complete and timely information on the establishment's performance on an allocation of opportunities basis;

3. cross reference applications for employment where a second or lower preference for employment in job classifications 6, 8 and 9 is indicated;

4. seek an adequate race, sex, ethnic mix in employment office staff, particularly interviewers;

5. do not discourage further interest of members of underutilized groups after placement shares are met.

"IV. Plant Training [Job Classifications 6 and 9]

A. Orientation—establish programs under which prospective women job entrants will be offered the opportunity to visit a field location prior to employment or transfer to the extent practicable. A supervisor will be responsible for conducting the visit.

B. Smaller climbers will be provided for women who need them.

C. Every person engaged for an outside plant craft job will be provided an information sheet which outlines the type of clothing necessary for performance of the job. When such items are not generally available, the Company will identify suppliers and so inform the employee.

D. A new, self-paced training program for learning pole climbing will be provided. Climbing training will be ex-

[4] 'Normal area of consideration' as used herein shall mean the appropriate geographic area taking into consideration geographic distribution of locations having the job title, traditional transfer patterns and reasonable commuting distance."

tended over a period of time in sessions of less than one full day to reduce the impact of physical fatigue. The training will provide remedial activities when a trainee fails certain exercises via recycling through the exercises. Trainees will be given adequate opportunities to meet criterion and mastery tests of the lessons before dismissal from the training program. The exact number of opportunities will be determined by field tests. The field testing should be completed by summer, and the final course materials will then be provided, stocked and be ready for distribution. A new self-paced program for learning pole climbing will be available to the telephone companies and used as required starting, where geographically possible, by December 1, 1975. In the interim period, operating companies will use either a self-paced training program, the fall-safe harness or other modifications in training designed to improve the success rates of women in pole climbing training.

E. Advanced Training—monitor the race, sex, ethnic composition of the employees attending courses which develop them for promotional or other opportunities to insure that qualified employees on a race, sex basis have equal access to these courses. If the composition indicates underrepresentation of underutilized groups, determine the causes of such underrepresentation and take steps to correct it.

F. Studies—conduct studies, such as interviews and questionnaires to successful and unsuccessful trainees, to determine problem areas and characteristics of successful and unsuccessful trainees.

G. Data on assignment to and performance in entry level training courses will be collected and analyzed by race, sex, ethnic group. The results will be monitored to identify problems in course completion by race, sex, ethnic group.

"V. Placement

When practicable, women will be assigned to work locations where other women are presently assigned.

When a new employee reports to a work location, the supervisor will spend the time necessary to assure that the employee is knowledgeable of job requirements, Company policies, Company benefits, safety regulations and equal opportunity policies.

The supervisor will also cover the highlights of the initial training process. Individual assistance, guidance, advice and instruction will be accorded the employee early in the work situation, in the first week on the job if possible, to further enhance her abilities on the job, including additional driver's instruction, climbing instruction and job accompaniment by the supervisor.

"VI. Responsibility and Accountability

It is the personal responsibility of each management employee to provide equal opportunity for all of his or her employees with regard to work assignments, training, transfers, advancements and other conditions and privileges of employment. That responsibility includes the obligation of taking corrective action to assure that employees respect the rights of fellow employees to seek and hold non-traditional jobs.

Management employees have been informed that their job performance is being evaluated on the basis of their equal employment opportunity efforts and results as well as all other job related criteria.

Supervisors at all levels of management regularly review the progress of their subordinates to be sure that non-discrimination is a fact.

If the Company determines that discrimination, on the basis of race, color, sex, religion, national origin or age, has occurred those responsible will be subject to appropriate disciplinary action, up to and including dismissal, depending on the severity of the case.

Nothing in this provision will be construed as modifying the grievance and arbitration procedures contained in applicable collective bargaining agreements, nor any standards of discipline otherwise applicable thereunder.

"VII. Modifications of this Appendix

A. Where a Company determines that any action required herein has proved ineffective in achieving targets or eliminating deficiencies, it may propose an alternative action to the government plaintiffs;

B. Where the government plaintiffs determine that an additional action is a necessary part of 'good faith efforts,' they may propose alternatives to the Company or Companies involved."

* * *

(These excerpts deal with a special fund that is being established in addition to the lump sum payments that will be made to certain employees.)

"1. Each Company listed on Appendix A shall contribute . . . to a Bell System Affirmative Action Fund. . . ."

* * *

"2. The AT&T Company, through its Human Resources Development Department, will administer the expenditure of this fund on affirmative action efforts in addition to those required by the January 18, 1973, Decree or provided for in Appendix B to this Order and for the benefit of members of some or all of deficient groups listed in Appendix A.

"3. Examples of programs to which this Bell System Affirmative Action Fund may be applied are as follows:

a. Studies designed to examine equipment used in craft positions which has been an obstacle to women's performance in classifications 6 and 9 as follows:

1. Ladder aids
2. Manhole covers
3. Cable lashers
4. Underground cable pulling operations
5. Drop-wire operations
6. Insulating gloves

b. Management Training Programs

1. Determine technical skills and knowledge required for certain 2nd and 3rd level management jobs and develop courses to enable such persons to move from non-technical management jobs to technical management jobs.

2. Institution of a 1st level Supervisory Relationship Training Program designed to improve supervisory effectiveness in working with employees in non-traditional jobs.

3. Conduct a feasibility study on the value of Awareness Training Program Packages for supervision of minorities and female managers.

c. Mechanical and Clerical Skills Training—The development of a Mechanical and Clerical Skills Internship Program for deficient group members in certain jobs under job classifications 8, 11, 12, 13. This program will include the identification of requirements for these jobs, counseling of persons in the program as to the requirements for these jobs and scholarship aid for training in these jobs.

d. Identification and the establishment of contacts with special interest groups with expertise in recruiting and referring minorities and females.

e. Establishment of recruitment centers in high impact minority neighborhoods for entry level clerical and craft positions."

EEOC v. Detroit Edison Company

Excerpts from the decision of the U.S. Court of Appeals, Sixth Circuit (Cincinnati), 515 F. 2d 301 (1975).

(These excerpts deal with discrimination in initial hiring, placement and promotion practices. See also the following excerpts on appropriate classes.)

"The record in this case supports the finding of the district court that there was a history of racial discrimination in the employment practices of Edison. These practices affected the hiring of blacks, as well as their initial placement and advancement after becoming employees. . . . The statistical evidence alone—showing a disproportionately low number of black employees—would be sufficient to support a finding of discrimination in hiring. . . . However, a great deal of evidence was produced of other practices of Edison which served to limit the number of black employees and to restrict the opportunities for advancement of those who were hired. The practice of relying on referrals by a predominantly white work force rather than seeking new employees in the marketplace for jobs was found to be discriminatory. The use of racial coding of applications and heavy reliance on subjective judgments of interviewers were found to discriminate against black applicants. Though Edison offered justification for its hiring practices, the findings are supported by substantial evidence.

"With respect to placement and promotion, the evidence relating to Edison's testing program established the existence of practices and procedures which consigned black employees to low-opportunity jobs. In light of proven differences in the scores of black and white subjects, Edison failed to demonstrate a differential validity for its test batteries. Further, the court was justified in finding that none of the test batteries had been properly validated considering job performance, the fact that no blacks were involved in some testing, the use of relatively high cutoff scores on many of the tests and the fact that many had not been evaluated for an excessive period of time. Claims of validation studies by Edison which were unsupported by written records could properly be discounted. The court relied on exhibits in the government presentation to find that substantial numbers of blacks were held back though they had demonstrated qualifications for the jobs they sought which were superior to those of successful white bidders. The evidence was in conflict, but none of these findings may be held clearly erroneous."

* * *

"Edison argues that it no longer engages in discriminatory practices and that the record of recent years shows a sharp increase in the hiring of blacks. We are urged to follow the Eighth Circuit in *Parham* v. *Southwestern Bell Telephone Co.*, . . . where it was held that, in spite of past discrimination, no injunctive relief was necessary or appropriate in view of the great strides which had been made since the institution of an affirmative action program in 1967. Though the record in the present case reflects some corrective actions on the part of Edison in recent years, we are unable to conclude that the district court was clearly erroneous in finding that Edison's efforts had been largely unproductive. Counsel for Edison have also assured the court that the company is now under new management which is committed to equal employment opportunities. In *United States* v. *I.B.E.W., Local 38*, . . . the appearance of new leadership in a union was held not to justify withholding affirmative relief.

"While concluding that an injunction was properly entered, the court must carefully examine other remedial provisions of the district court's order in light of the provisions of the Act and court opinions which have dealt with questions similar to those raised in this appeal."

* * *

"All black employees of Edison are eligible to be considered for back-pay awards. There was no claim of un-

lawful discharges in this case, but there may be former employees who have left the service of Edison and who should participate in the back-pay provisions of the decree as finally formulated. . . . [R]ejected black applicants for employment must [also] be considered for back pay. . . . Not every black employee or rejected black applicant of Edison will automatically qualify for a back-pay award. But each such person should be given an opportunity to establish his entitlement."

EEOC v. Detroit Edison Company

Excerpts from the decision of the U.S. Court of Appeals, Sixth Circuit (Cincinnati), 515 F. 2d 301 (1975).

(These excerpts deal with the determination of appropriate classes in a Title VII action. An "amorphous" class of those who would have applied to a company but for its reputation of not hiring blacks was rejected.)

"The district court properly considered the claim in the government case that black citizens had been rejected for employment and otherwise denied employment opportunities by Edison because of race.

". . . [T]he court also included in the class represented by the private plaintiffs those persons who would have applied for employment with Edison except for its reputation of not hiring blacks. Although the private plaintiffs pled that Edison had established a reputation in the black community for discriminating against applicants because of race or color, there was no allegation that this reputation actually deterred anyone from applying for employment. No witness testified that he would have applied for employment at Edison but was deterred because of its bad reputation. Several employees of Edison testified to a reputation for discrimination against blacks, but these were people who did not rely on the reputation and were accepted for employment. The government did not refer to this class in its complaint and requested no relief for it . . . counsel for the government referred to this as an 'amorphous' class and stated that if such a class existed it would only have been between 1965 and 1968. The government admitted that inclusion of such a class would create serious problems because the identification of individual members would be virtually impossible as would be a determination of the availability of openings for such persons.

". . . [T]he evidence concerning hiring procedures, rejections and even reputation was competent to prove the allegations of the government complaint. Its admission without specific objection . . . was not sufficient to enlarge the class represented by plaintiffs to include non-employees of Edison."

Meadows v. Ford Motor Company

Excerpt from the decision of the U.S. Court of Appeals, Sixth Circuit (Cincinnati), 510 F. 2d 939 (1975).

(This excerpt deals with the determination of appropriate retroactive job seniority and fringe benefit eligibility for individuals subjected to discrimination in hiring. See also *Franks v. Bowman Transportation*, excerpted on page 22, now being reviewed by the Supreme Court.)

"Whatever the difficulties of determining back pay awards, the award of retroactive job seniority offers still greater problems. Seniority is a system of job security. . . . It is justified among workers by the concept that the older workers in point of service have earned their retention of jobs by the length of prior services for the particular employer. From the employer's point of view, it is justified by the fact that it means retention of the most experienced and presumably most skilled of the work force. Obviously, the grant of fully retroactive seniority would collide with both of these principles.

"In addition, where the burden of retroactive pay falls upon the party which violated the law, the burden of retroactive seniority for determination of layoff would fall directly upon other workers who have themselves had no hand in the wrongdoing found by the District Court.

"There is, however, no prohibition to be found in the statute we construe in this case which prohibits retroactive seniority and, of course, the remedy for the wrong of discriminatory refusal to hire lies in the first instance with the District Judge. For his guidance on this issue we observe, however, that a grant of retroactive seniority would not depend solely upon the existence of a record sufficient to justify back pay under the standards of the Back Pay Section of this opinion. The court would, in dealing with job seniority, need also to consider the interests of the workers who might be displaced as well as the interests of the employer in retaining an experienced work force. We do not assume, as our brethern in the Fifth Circuit appear to, . . . that such reconciliation is impossible, but as is obvious, we certainly do foresee genuine difficulties. . . .

"On remand the District Judge may desire to hear the policy questions involved in this problem before remanding the individual claims to the Master. For purposes of that hearing notice should be given to the employees likely to be affected and intervention should be allowed from appropriate representatives.

"What we have said concerning job seniority does not, of course, apply to the fringe benefits of employment. Where vacation schedules or pension rights (or other fringe benefits) are determined by date of hire, we perceive no reason why that date in these cases should be other than the date which the trial court fixes as the date when the employee would have been hired, absent the illegal hiring practices which the District Court has identified and enjoined."

United States v. Georgia Power Company

Excerpts from the decision of the U.S. Court of Appeals,

Fifth Circuit (New Orleans), 474 F. 2d 906 (1973).

(These excerpts deal with the need for an employer's validation studies to take into account the way the tests are actually being used by the company.)

". . . Not only was the Hite Study, as conducted, substantially at variance with the minimums of the EEOC validation guidelines recommended by Griggs, but, as significantly, its premises also departed from the practices followed by the company in the testing program as administered. For these reasons the study's final induction—a positive correlation of test results vis-a-vis job performance at Georgia Power—was invalid. We conclude that the district court erred as a matter of law in relying on the Hite Study to find that Georgia Power had met the burden of manifesting its tests were job related.

"However, testing is an expressly approved employment practice under Title VII. It is an effective tool for employee selection 'provided . . . it is not used to discriminate because of race. . . .' Moreover, standards for testing validity comprise a new and complicated area of the law. While the Hite Study did not demonstrate compliance with the Act, we hesitate to penalize this litigant, the first to confront such a demanding burden of proof, for failing to introduce a more rigorous study. Had our standards been articulated at the time of trial, it may be that the company could have proven its compliance. Therefore, rather than now proscribing the testing program which Georgia Power has used, we remand this phase of the case to the trial court with directions to permit the company a reasonably prompt opportunity to validate the testing program applied to the plaintiffs, in accordance with the principles enunciated in this opinion."

Douglas v. Hampton

Excerpts from the decision of the U.S. Court of Appeals, District of Columbia Circuit, 10 FEP Cases 91 (1975).

(These excerpts deal with establishing the validity of a major civil service examination that has a discriminatory impact. The case is being appealed to the Supreme Court.)

"The FSEE [Federal Service Entrance Examination] is the 'primary avenue of entry' into managerial and professional positions in the federal civil service. The examination was developed by the Commission for this purpose and was first used in 1955. It is administered to approximately 150,000 applicants annually, and the results are used to fill about 10,000 positions in over 200 job categories throughout the Federal Government. The jobs are widely varied, including those of computer specialist, customs inspector, economist, psychologist, social service representative and many more.

"It goes without saying that the Commission is prohibited from discriminating on the basis of race in the hiring or rating of federal employees. The major differences between the parties on this appeal concern interpretation of the standard by which the Commission's employment practices are to be measured. Numerous cases in the federal courts have involved challenges to standardized aptitude tests on both constitutional and statutory grounds. No court has distinguished the standard mandated by the Fifth and Fourteenth Amendments from that specified by Title VII of the Civil Rights Act of 1964. In 1971 the Supreme Court defined the Title VII standard for private employers in Griggs v. Duke Power Company, and since that decision Congress has extended the reach of Title VII to public employers, including the Federal Government. Congress clearly intended to give public employees the same substantive rights and remedies that had previously been provided for employees in the private sector; beyond that, the applicability of the Griggs standard has also been recognized in numerous cases involving public employees not grounded on Title VII. So, notwithstanding the several equal protection guarantees implicated in this litigation, the Griggs standard is the measure of the rights and liabilities of the parties. . . .

"The Commission does not maintain pass-fail data on the FSEE by race. As a result, any evaluation of the racial impact of the FSEE must be based on data approximating direct evidence of black performance on the FSEE. Appellants have produced two statistical analyses, of information furnished by the Commission, clearly establishing that whites perform much better than blacks."

* * *

"The factual demonstration made by appellants is corroborated by the 'substantial body of evidence that black persons and other disadvantaged groups perform on the average far below the norm for whites on generalized intelligence or aptitude tests.' Judicial decisions in the 'ever-extending series of challenges to civil service examinations' unequivocally establish that blacks are test-rejected more frequently than whites, and that this phenomenon is the result of a long history of educational and cultural deprivation rather than an innate lack of qualifications.

"These data have great importance in any determination of the legality of the FSEE. In considering the 1972 amendments to Title VII, Congress recognized that standardized tests in hiring for the federal service may operate to the detriment of disadvantaged minorities:

'Civil Service selection and promotion requirements are replete with artificial selection and promotion requirements that place a premium on "paper" credentials which frequently prove of questionable value as a means of predicting actual job performance. The problem is further aggravated by the [Civil Service Commission's] use of general ability tests which are not aimed at any direct relationship to specific jobs. The inevitable consequence

of this, as demonstrated by similar practices in the private sector, and, found unlawful by the Supreme Court, is that classes of persons who are culturally or educationally disadvantaged are subjected to a heavier burden in seeking employment.'

"The responsibility of the courts to give the data their just due is thus clear."

* * *

"When a showing of racially disproportionate impact has been made, the courts have required employers to prove the validity of the challenged employment practice. . . . The courts that have expressed a view on the relative merits of these techniques have uniformly manifested a preference for proof of empirical validity."

"Appellees do not contend that the FSEE has empirical validity. Indeed, two investigations of the empirical validity of the FSEE have been made, and neither would support a claim for empirical validity. . . .

"Appellees maintain that they have shown the FSEE to be job related through construct validity. The Commission, they say, conducted extensive job analyses and concluded that verbal and quantitative abilities were significantly related to ability to perform the jobs for which the FSEE is used, and the FSEE was then designed to measure these abilities. Appellants argue that empirical validity is required in all cases and that appellees' assertion of construct validity will not fulfill their heavy burden of proving job relatedness.

"The guidelines promulgated by the Equal Employment Opportunity Commission, which incorporate the professional standards stated by the American Psychological Association, recognize the value of construct validity only when proof of empirical validity is not feasible. These guidelines have been cited with approval by the Supreme Court, followed by all courts dealing with these issues, and recognized as controlling in at least one circuit. We think it unwise to depart from these accepted principles at this stage in the development of the law concerning equal employment opportunity. We hold that construct validity may be considered only after a showing that it is infeasible to undertake proof of empirical validity."

* * *

"Appellants are also concerned that the standard for establishing test validity set out in the Commission's guidelines are weaker than those imposed by the EEOC guidelines and the legal precedents. Primarily because the Commission apparently has never interpreted its guidelines in an adjudicative proceeding, we are uncertain as to what standards are incorporated therein. The guidelines require a 'rational relationship' between the tests and job performance, but we do not understand this term to carry the same meaning as in equal protection cases that decline to apply a 'strict scrutiny' standard. Nor do we think the meaning of the term in the context of test validity is clear and unequivocal. The Commission's regulations are sufficiently flexible to permit an interpretation that will comport with present statutory and constitutional standards of equal employment opportunity. Certainly the uncertainty of the standard to be applied will not justify reversing a discretionary decision to seek the aid of agency expertise and remand the case to the Commission."

Bridgeport Guard. Inc. v. Members of Bridgeport C.S. Com'n.

Excerpts from the decision of the U.S. Court of Appeals, Second Circuit (New York), 482 F. 2d 1333 (1973).

(These excerpts deal with discriminatory testing requirements for policemen under the Constitution and the Civil Rights Acts of 1866 and 1871. The Court notes that the Supreme Court has also cited such cases in connection with Title VII.)

"An applicant for the Bridgeport Police Department must meet age and physical requirements, possess emotional stability, have good moral character and an aptitude for increasing his knowledge of crime detection and law enforcement techniques. He must take a written exam with a passing grade of 75 on a scale of 0 to 100. The grade is established in the rules of the Civil Service Commission and applies to all Civil Service tests given in the City. The applicant's prior training and experience is rated according to a chart assigning arithmetical values for experience and higher education. A background investigation is conducted for all who pass the written exam and the physical requirements. The director of Civil Service reviews the background investigation and in his discretion determines whether the applicant is suitable. A numerical rating is then assigned by weighting the exam grade at 70% and training and experience at 30%. The eligibility list ranks the successful applicants in accordance with this weighted average and the list is valid for two years.

"The claim of the plaintiffs is that their constitutional rights to Equal Protection under the Fourteenth Amendment have been violated primarily because the written examination denies them equal employment opportunity. The court below found that the plaintiffs had made a *prima facie* showing of discrimination and the evidence amply supports the finding. Between 1965 and 1970 some 644 persons took the policeman's written examination. 58% of the 568 White candidates passed while only 17% of the 76 Black and Puerto Rican applicants were successful. . . . This is a greater disparity than that existing in comparable cases where courts have found that a case of *prima facie* discrimination was established. Moreover while Bridgeport has a combined Black and Spanish speaking population of 25%, members of these minorities only represent 3.6% of the Department. It is further significant

that the cities of Hartford and New Haven, Connecticut, which have roughly the same population and the same size police departments, show a decidedly better record of minority police employment."

* * *

"The public employment test cases are *sui generis* in that the classification is not made by the municipal body but results from a testing device which in fact results in an invidious discrimination since it disadvantages minority groups. Hence, while the right to public employment is not fundamental in an Equal Protection context . . . there is a suspect (racial) classification which ensues. There have been so many of these cases in litigation that a viable test has emerged which in fact was adopted by the court below and has wide judicial support. Where the plaintiffs have established that the disparity between the hiring of Whites and minorities is of sufficient magnitude, then there is a heavy burden on the defendant to establish that the examination creating the discrimination bears a demonstrable relationship to successful performance of the jobs for which they were used. This essentially was the test employed by this court in Chance [v. Board of Examiners, 458 F. 2d 1167 (2d Cir 1972)] and by the First Circuit in Castro v. Beecher, 459 F. 2d 725 . . . (1972). This 'job relatedness' test was recently employed by the Supreme Court in McDonnell Douglas Corp. v. Green. . . . While McDonnell was a Title VII case and did not technically involve Equal Protection issues, it is significant that the court relied not only on Griggs v. Duke Power Co., . . . but also cited both Castro and Chance which were Section 1983 cases as is the case before us. . . .

"We therefore turn to the question of whether the defendants have established that the written examination under attack was 'job related.' . . . Judge Newman meticulously reviewed the evidence and concluded that the defendants had failed to sustain their burden. We cannot characterize this to be a clearly erroneous finding.

"The best method of establishing job relatedness is to establish that the test had 'predictive validity.' Criteria must be identified which indicate successful job performance. Test scores are then matched with job performance ratings for the selected criteria. This establishes realistically whether the applicant who received high scores was actually performing as predicted. No validation studies have been conducted here either before the exams were given or later. Two other recognized methods of insuring that examinations are job related are based upon so called 'construct validity' and 'content validity.' Construct validity would be achieved if there had been an identification of the characteristics believed important to successful job performance followed by the structuring of an examination directed to a determination of the degree to which the applicant possessed the required characteristics. Content validity would be established if the content of the test closely duplicates the actual duties to be performed. . . . While it is concededly difficult to prepare examinations which can accurately calibrate and measure the ability of a person to perform the duties of a policeman which combines not only professional skills but decisions involving judgment and tact and qualities of personal courage, compassion, dedication and moral probity, we are persuaded that the challenged examination was primarily based upon verbal skills and was not significantly job related.

"The examination used was not prepared by the defendants but was purchased from the Public Personnel Association (PPA), a private nonprofit corporation. It was prepared in 1953 and is utilized by several hundred governmental agencies. It is basically an intelligence test not geared in any significant fashion to establish whether or not the applicant will be a good policeman. Thus many of the vocabulary and arithmetic questions are only superficially or peripherally related to police activity. For example:

> '69. Cartridges cost retail $3.00 for boxes of 20. The wholesale cost is $2.25 a box plus $.25 a hundred shipping charge. How much is saved if 300 are purchased wholesale?'

While policemen do use cartridges, the question has in fact nothing specifically to do with the work of the police. If the word 'Bible' were substituted for 'cartridge,' the answer would be the same but it would hardly be probative of an applicant's fitness for the ministry or even as a Bible salesman. The question selected is not atypical. Aside from irrelevancy the examination's stress on vocabulary and verbal skills produces a cultural bias according to the testimony of Richard Barrett, a recognized expert in testing. Moreover, that part of the test which does seem relevant, the ability to observe and remember faces and data, consists of displaying eight sets of front and profile mug shots, but all of the faces are of Whites. Barrett testified that it was probably easier for Whites to distinguish among White faces than for Blacks. There is some support for this view. The entrance examination is further vulnerable in that the City ordinance mandates a uniform cut-off score of 75. This is an arbitrary determination indicative of an archaic testing system particularly where there is no evidence of weighing of questions based upon actual job requirements."

Vulcan Soc. of N.Y. City Fire Dept., Inc. v. Civil Service Commission

Excerpts from the decision of the U.S. Court of Appeals, Appeals, Second Circuit (New York), 490 F. 2d 387 (1973).

(These excerpts deal with the lack of job relatedness of a written examination to select fireman, which had an adverse impact on the employment opportunities of Negro and Hispanic applicants. The suit was brought under the

Civil Rights Act of 1871 and the Fourteenth Amendment to the Constitution.)

"On June 12, in a comprehensive opinion, the district judge ruled that the written examination had a discriminatory impact and that it was not sufficiently job-related to justify its use. . . .

* * * *

"Although the judge placed particular emphasis on the unrelatedness of the civic affairs questions, this was not the limit of his criticism of the written examination. He sustained plaintiffs' contention that defendants failed to perform an adequate job analysis in preparing the examination and said that 'The record compels the conclusion that the procedures employed by defendants to construct Exam 0159 did not measure up to professionally accepted standards concerning content validity.' "

* * *

"Cases like this one have led the courts deep into the jargon of psychological testing. Plaintiffs insist that the only satisfactory examinations are those which have been subjected to 'predictive validation,' or 'concurrent validation,' preferably the former. . . . The judge wisely declined to insist on either. . . . Experience teaches that the preferred method of today may be the rejected one of tomorrow. What is required is simply that an examination must be 'shown to bear a demonstrable relationship to successful performance of the jobs for which it was used.'

"Instead of burying himself in a question-by-question analysis of Exam 0159 . . . the judge noted that it was critical to each of the valididation schemes that the examination be carefully prepared with a keen awareness of the need to design questions to test for particular traits or abilities that had been determined to be relevant to the job. As we read his opinion, the judge developed a sort of sliding scale for evaluating the examination, wherein the poorer the quality of the test preparation, the greater must be the showing that the examination was properly job-related, and *vice versa*. This was the point he made in saying that a showing of poor preparation of an examination entails the need of 'the most convincing testimony as to job-relatedness.' The judge's approach makes excellent sense to us. If an examination has been badly prepared, the chance that it will turn out to be job-related is small. *Per contra*, careful preparation gives ground for an inference, rebuttable to be sure, that success has been achieved. A principle of this sort is useful in lessening the burden of judicial examination-reading and the risk that a court will fall into error in umpiring a battle of experts who speak a language it does not fully understand. . . .

"The court's findings with respect to the construction of the examination were as follows:

'The only witness who testified concerning the construction of Exam 0159 was Edward Scheinkman, not a Fire Department official, but Assistant Chief of the Division of The Department of Personnel charged with responsibility for its preparation. Mr. Scheinkman began preparing the examination by gathering together the file on the previous examination, the former notice of examination, the class specifications (a very cursory description of the job contained in the notice of examination) and a magazine published by the Department. He contacted Chief Hartnett, who was then in charge of the Training Division of the Department, to inquire as to the Department's view of the areas of knowledge which should be included in the examination. Hartnett suggested that the subjects covered in the last test should be covered again, with the addition of a section on City government and current events. Somewhat significantly, Fire Commissioner Lowery, with his years of experience as a fire fighter and as an administrator, was not consulted as to the content of the written examination. Scheinkman testified that he never performed any job analyses, did not know of any which were used in the preparation of Exam 0159 and that none were made while he was in the division which prepared examinations for the job of firemen.'

"Appellants do not seriously assert that these findings are clearly erroneous, and our examination of the record convinces us they are far from being so.

"The judge was also warranted in rejecting the testimony of defendants' expert, Forbes McCann, that, except for the twenty civics questions, Scheinkman had achieved the miracle of stumbling into an examination that bore 'a demonstrable relationship to successful performance of the jobs' without having formulated an adequate analysis of just what the jobs were or what traits they demanded.

"It is arguable that McCann's testimony proved the opposite of what he contended. Like Scheinkman, he insisted that the purpose of the test was to examine for the *ability to learn* to become a fireman in the probationary training school, not for the ability to perform the tasks required of a fireman. Performance on a written multiple-choice examination may well correlate quite highly with the ability to learn certain skills but not with the ability to perform them on the job.[11] On the other hand, the defendants could respond that since the probationary training school is a necessary element in becoming a good

[11] The danger of distortion in this regard is particularly acute, since performance in the probationary school is also evaluated by means of a written examination. Thus, there is a distinct possibility that a claim that the qualifying examination tests for ability to learn in the probationary school is in fact no more than a claim that performance on the written qualifying examination predicts with reasonable accuracy performance on the written probationary examination. Without evidence that the second examination is job related, such a demonstration is barren indeed."

fireman, the Department is justified in weeding out applicants who cannot benefit sufficiently from the training to be there afforded.

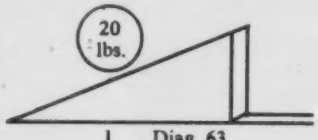
"We prefer not to enter this morass, since there were ample grounds for rejecting McCann's testimony even if his premise were to be accepted. We cite a few: His assertion that ability to comprehend written materials was the most important single factor in a fireman's job is at war with common sense. His defense of the mathematics questions, despite his concession that very few firemen occupy jobs that require calculating skills, on the ground that there were only six or seven such questions on the test, ignored two important factors: One was that the scores on the examination were so closely bunched that a difference of only a few points could mean the difference of several thousand places on the eligibility list. The other was that since many other questions either were plainly invalid or too easy to have any differentiating effect,[12] the six or seven mathematics questions actually constituted about 20% of the resolving power of the test. The court was abundantly justified in accepting the criticism of this test by plaintiffs' experts and rejecting the defense."

* * *

"[12] We cite as an example the 20 questions in Part II of the examination which were intended to test vocabulary. More than 95% of both a sample group of high scorers and a sample group of low scorers on the examination got the same six vocabulary questions right. Another two words were correctly identified by more than 90% of the low scorers and close to 100% of the high scorers. Therefore, practically speaking, only twelve words had any effect on the outcome. Those included 'attest,' 'destitute,' 'luminous,' 'apex,' 'raze,' 'deficit,' and 'irate.' It is hard to understand how the ability to find the closest analogue to most of these words is a good test of the ability to fight fires or, for that matter, to absorb written materials about this in a probationary training school.

"Common sense also suggests many flaws in the physics-mathematics series. One example is Question 63, which we reproduce below:

'63. In what direction does the force of gravity pull the 20 lb. weight placed on the board in diagram 63?



Diag. 63

(A) (B) (C) (D)'

A high school physics student would know the correct answer is (C), but the wrong answer (A) might be more useful for a fireman on the job. The preceding question seems equally without job relationship; while it may be of some value for a fireman to know that 'A ball rolling along level ground will slow down and come to a stop,' we cannot appreciate the importance of his knowing whether the force that accomplishes this is called velocity, momentum, friction or equilibrium."

"The defendants and the intervenors ask us to set aside Judge Weinfeld's finding that Exam 0159 was insufficiently job-related because of the absence of a competitive, as distinguished from a merely qualifying, physical examination. We decline to do so.

"We can speedily reject the first ground of attack, namely, the absence of evidence that the minority group candidates would do better than whites on a competitive physical examination. This misinterprets Judge Weinfeld's opinion. He did not hold that the use of a merely qualifying physical in itself necessarily or even probably worked against the minorities; what he held was that the absence of a competitive physical in the selection process for a largely physical vocation was additional evidence of the lack of job-relatedness of the selection procedure considered as a whole.

"We likewise reject the claim that there was insufficient evidence to support this finding. Several witnesses testified to the high physical demands of a fireman's job. The Department had conducted competitive physical examinations from 1919 to 1968, and Fire Commissioner Lowery and Fire Chief O'Hagen expressed a strong and well reasoned preference for the practice. . . . The only truly contrary opinion was McCann's, and the court was warranted in considering his reasons to be unpersuasive. It is true that some of a fireman's duties, e.g., inspection, may require little or no physical prowess and that . . . the intellectual content of a fireman's work may have increased far beyond that familiar in our youth. But that does not mean that no significant physical content remains.

"We stress the limited nature of our holding. We do not read Judge Weinfeld as having said that if a written examination were sufficiently job-related, a competitive physical would *always* be constitutionally required, although he obviously would view such a physical with favor. There are consideration [sic] of cost and convenience that militate against giving a competitive physical to an extremely large group, including some who will rank so low on a proper written examination that even an Olympic score on a competitive physical would not put them within hiring range. Plaintiffs say these difficulties can be readily overcome, but they do not tell us how. In any event, there is no need to decide the question at this time. All that we regard the judge as having held, and all that we now approve, is that, in combination with the defects in preparation and content of Exam 0159 which we have described, the use of a merely qualifying physical examination rendered the Fire Department's selection procedures insufficiently job-related to withstand constitutional attack."

Nondiscrimination in Promotion

Green v. Board of Regents of Texas Tech University

Excerpts from the decision of the U.S. Court of Appeals, Fifth Circuit (New Orleans), 474 F. 2d 594 (1973).

(These excerpts deal with whether a university's failure to promote a woman to full professor was because of sex discrimination. The suit was brought under the Civil Rights Act of 1871.)

"Dr. Green has taught at Texas Tech University since 1946, except for her absence during 1951-1953 when she worked on her doctorate. First a temporary instructor, she was promoted to Assistant Professor in 1953 and to Associate Professor in 1959. In the 1969-1970 academic year, she made timely application to the University for promotion. When denied, she complied with the appropriate administrative procedure. This action was brought when the Board of Regents refused to grant the promotion.

"The District Court held an evidentiary hearing on both the merits of her claim and the administrative procedure through which plaintiff's application was processed. A diagram of the procedure is as follows:

HEAD OF THE ENGLISH DEPARTMENT
(All professors of the English Department consider and vote upon the application and may submit statements to the Head of the Department.)
DEAN OF THE COLLEGE OF ARTS AND SCIENCES
(Six-member Promotions and Tenure Committee of the Department of Arts and Sciences considers and votes upon the application to advise the Dean.)
GRADUATE DEAN
VICE PRESIDENT OF ACADEMIC AFFAIRS
PRESIDENT OF TEXAS TECH UNIVERSITY
TENURE AND PRIVILEGE COMMITTEE OF TEXAS TECH UNIVERSITY
(Committee reviews for determination of compliance with due process. Applicant represented by attorney.)
ACADEMIC COMMITTEE OF THE TEXAS TECH UNIVERSITY BOARD OF REGENTS
FULL BOARD OF REGENTS OF TEXAS TECH UNIVERSITY

". . . Although her prior applications had failed to receive majority support from her own department, in 1969 plaintiff's colleagues in the English Department voted 5 to 3 in favor of her promotion. Thereafter, at every level of review, Dr. Green's application received a unanimous negative response.

"At each stage of the procedure, questions unrelated to Dr. Green's sex were raised regarding her qualifications as to teaching ability, scholarship, and university and community service. Professors and administrators at all levels of the review testified before the District Court as to their opinions of Dr. Green's work and ability which led to a denial of the promotion. . . . Even at the first stage, where her application obtained a majority for approval, two faculty members in the minority testified that Dr. Green was deficient in both teaching and research as evidenced, in their opinions, by students' complaints about her teaching, the disinclination of graduate students to seek her direction on theses, and her failure to publish any substantial research. . . .

"Dr. Green complains that the District Court refused to consider whether the University discriminated toward women as a class. The District Court considered, however, all the evidence, including comparative charts and statistics, that was directly related to the denial of Dr. Green's application for promotion. This was not a class action. On appeal, plaintiff concedes that no relief is sought for a class. We perceive no error in the District Court's determination as to what evidence was relevant to Dr. Green's claim.

"Plaintiff's points of error concerning the alleged failure of the University to establish definite criteria controlling promotions in teaching rank, the Court's holding that the University had not acted capriciously and had not abused its discretion, and the Court's requirement of direct noninferential evidence of discrimination against plaintiff personally all fall under the positive finding by the Court that plaintiff's application was given fair and impartial treatment and that the refusal of promotion was based on the facts of plaintiff's record, without any regard being given to her sex. The University's standards are matters of professional judgment, and here substantially every individual or committee in the institution's reviewing body questioned Dr. Green's competence. . . .

"Affirmed."

United States v. N. L. Industries, Inc.

Excerpt from the decision of the U.S. Court of Appeals, Eighth Circuit (St. Louis), 479 F. 2d 354 (1973).

(This excerpt deals with remedying past discrimination in the selection of individuals for promotion as foremen.)

"[I]n determining an appropriate minority-nonminority hiring ratio, we think that the number of qualified blacks available is an important factor and the evidence indicates that a substantial number of blacks already working in the plant possess the necessary qualifications for promotion to supervisory positions. Thus, we conclude that a one-black-to-one-white ratio is appropriate here until 15 blacks have been promoted to front line foreman positions. We do not think that 15 black foremen out of 100 is an unreasonable initial goal in light of the fact that blacks represent approximately 25 percent of the Company's production workers. . . . [T]his procedure does not constitute a quota system, because upon complete implementation of this order, all future promotions will be on a nondiscriminatory basis and the racial composition of a job classification may contain a percentage of blacks which may be more or less than the percentage of blacks in the other areas of the plant or in the community at large.

"The strong deterrent to the selection of black foremen, in part, comes from the selection procedures used by the Company. Thus we further direct that the district court

order a revision of the selection system for foremen which meets these requirements:

(1) The Company shall promulgate in writing and publish throughout the plant reasonably objective standards for its selection of foremen.

(2) The Company shall develop a roster of plant personnel eligible for promotion to foreman.

(3) All plant personnel who deem themselves qualified shall be entitled to submit an application for this roster.

(4) The Company shall evaluate and rate candidates for the position of foreman without regard to race and upon reasonably objective standards.

(5) Foremen shall be selected without regard to their race and without regard to whether predominantly black or predominantly white crews are to be supervised.

(6) Those black employees previously listed as possessing potential as foremen shall be entitled to be placed upon the foreman's roster if they meet the appropriate standards.

(7) Foremen must be selected on the basis of merit as judged by reasonably objective written standards."

Gilmore v. Kansas City Terminal Railway Company

Excerpt from the decision of the U.S. Court of Appeals, Eighth Circuit (St. Louis), 509 F. 2d 48 (1975).

(This excerpt deals with an individual charge of discrimination when the qualifications required for promotion to a supervisory position by an employer are alleged to have a racially discriminatory effect. See below for other excerpts from this decision.)

"Gilmore asserted an individual claim for relief based upon Terminal's failure to promote him to a specific lower level supervisory position. However, his testimony at the evidentiary hearing disclosed that he did not possess the requisite skills which Terminal claimed were essential to that position.

"To establish a prima facie case of employment discrimination upon private claims for relief, an aggrieved must show:

'(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.'

"At issue in this case, however, unlike McDonnell Douglas Corp. v. Green, is the question of possibly racially discriminatory effects of the qualifications themselves. . . . Thus Gilmore's claim of racial discrimination should be reassessed after the class claims have been resolved. To the extent that his lack of 'skills and experience' are attributable to present discrimination or the vestiges of past discrimination unsupportable by business necessity, or to the extent that those qualifications do not bear a manifest relationship to job performance, Gilmore may be entitled to relief. Otherwise the trial court may properly conclude that Gilmore was not the subject of racial discrimination. . . ."

Gilmore v. Kansas City Terminal Railway Company

Excerpts from the decision of the U.S. Court of Appeals, Eighth Circuit (St. Louis), 509 F. 2d 48 (1975).

(These excerpts deal with the qualifications an employer may require for promotion to supervisory and managerial positions when there has been past discrimination. They also point up the potential partial liability of the union in such a situation.)

"At the outset we note that employment policies affecting supervisory and managerial positions are not insulated from the reaches of Title VII enforcement. Our own Court, as well as others, has found violations of Title VII in an employer's policy of promotion to supervisory positions not governed by union contract, but selected totally at the employer's discretion."

* * *

". . . Moreover, we have found that in class action discrimination cases statistics create a prima facie case of discrimination specifically in the context of supervisory personnel. . . . Such a showing of disparity between an employer's work force and the population in the relevant market area has been held sufficient to shift the burden to the employer to rebut the inference that racial considerations have dictated employment choices. . . . Statistical evidence, however, is not sufficient as a matter of law to establish a violation of Title VII . . . when the defense of lack of qualified minority applicants is interposed by the employer. In that event, however, 'Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.'

"It is then open to the plaintiffs to demonstrate a violation of Title VII on either of two independent bases: that the employment policies reflect present discriminatory conduct or that current policies, though neutral on their face, carry forward vestiges of past discrimination. This represents the traditional dual focus in civil rights litigation upon purpose, as well as effect. Discrimination resulting from either commands relief.

"In this respect, work experience and intradepartmental preference are two aspects of Terminal's promotion policy. Without determining whether the work experience qualification meets the requirements of Griggs v. Duke Power Co., . . . we note that Terminal urges that an insufficient number of minority applicants have attained the requisite work experience in some departments and also that in

other departments there is little or no minority representation. This suggests that the bargaining representative for those departments may have discriminated in the past and that vestiges of that discrimination endure within those departments. The fact of possible prior union discrimination is thus relevant to the determination of whether Terminal's promotion policy, which appears neutral on its face, actually carries forward the effects of prior discrimination. If it does, the intradepartmental preference must be modified by making the primary requirement one of experience in a functionally related job which provided the same degree of skill, familiarity and knowledge that work experience within the department would have provided.

"Thus, while Title VII recognized two separate causes of action against unions and employers . . . it appears on the face of the record before us that the district court's most effective remedy will include the unions as well as Terminal. To effectuate the 'breadth and flexibility . . . inherent' in the 'district court's equitable power to remedy past wrongs,' . . . then, this remand to the district court is with specific directions to the plaintiffs to join the relevant unions in this discrimination case."

Rogers v. International Paper Company

Excerpts from the decision of the U.S. Court of Appeals, Eighth Circuit (St. Louis), 510 F. 2d 1340 (1975).

(These excerpts deal with the qualifications an employer may require for promotion in remedying past discrimination. They also highlight the fact that meeting OFCC requirements may not satisfy Title VII requirements, as interpreted by the courts.)

"The Supreme Court has announced that a district court has:

'not merely the power but the duty to render a decree which will so far as possible eliminate the *discriminatory effects of the past* as well as bar like discrimination in the future.'

Louisiana v. United States, 380 U.S. 145, 154 (1965) (emphasis added). . . ."

* * *

"Pre-Act discriminatory conduct is thus an integral component in the calculus of employment discrimination and remedial relief."

* * *

"The necessity to serve in every job in a line of progression, with a few exceptions, is still an announced policy of I.P. . . . The cumulative effect of this policy is to severely restrict the possibility of job skipping or advanced level entry transfer opportunities. These seemingly neutral requirements . . . have impeded, in the past, affected class members' progress toward their rightful place. They may be retained, therefore, only upon a showing of business necessity."

* * *

"Finally, even assuming the trial court should determine that each job is essential to progression, I.P. has in the past, though in part in reliance on OFCC, retarded affected class promotion by its administration of the announced policies. After the McCreedy Letter, competition for permanent vacancies was limited to only those permanently assigned to the position immediately subordinate to the vacancy. This policy effectively eliminated competition for permanent vacancies, and was totally ineffectual in rendering whole the former discriminatees. . . .

"For these reasons we conclude that the present transfer, promotion, and seniority practices in the production department at Pine Bluff continue to perpetuate the effects of past discrimination. No significant movement to rightful places has been realized by former discriminatees, although some movement has been accomplished. Thus some relief is warranted, and the district court was in error in denying such relief."

* * *

"The district court should require that I.P. demonstrate which jobs provide essential training for progression and are supported by business necessity and which jobs, if any, could be skipped upon entry and promotion. The court should also review the lengths of the residency requirements to determine whether they are the least restrictive means to accomplish their purpose and consider whether functionally equivalent experience in former lines of progression may satisfy those requirements. Finally, the court should review I.P.'s administration of its policy of advancement of affected class members to their rightful place in light of I.P.'s . . . rightful place policy [for those who have been away on military leave] with a view toward rendering whole these former discriminatees as expeditiously as possible and to the same extent that it now accords a rightful place to returning service men. Provisions of this relief should be made available to all affected class members regardless of whether they have declined transfer offers in the past. If these conditions are fully implemented, the need for a back pay award will be obviated."

Nondiscrimination in Compensation

Hodgson v. Behrens Drug Company

Excerpts from the decision of the U.S. Court of Appeals, Fifth Circuit (New Orleans), 475 F. 2d 1041 (1973). The Supreme Court refused to review this decision, 414 US 826 (1973).

(These excerpts deal with whether an employer's training program constitutes a legitimate distinguishing "factor other than sex" under the Equal Pay Act.)

"For many years Behrens has employed females in its Tyler division warehouse as 'order clerks.' The principal responsibilities of an 'order clerk' include: arranging merchandise on the warehouse shelves, filling customer orders by gathering the requested stock and sending it along to the 'checker,' and restocking the shelves. . . . Behrens admitted and the district court found that certain male employees, designated 'sales trainees,' performed work substantially equal to that of the female 'order clerks' during the period in question. . . .

"Behrens acknowledged that the male 'sales trainees' were paid a higher wage than 'order clerks' for doing the same work, but sought to justify this wage discrepancy as based on a bona fide training program, purportedly constituting a legitimate distinguishing factor other than sex."

* * *

"[T]he Secretary [of Labor]'s Interpretative Bulletin, expressly designates bona fide training programs as one factor other than sex which may validly produce a male-female wage gap."

* * *

"The Behrens sales training program suffers from two principal weaknesses. First, the Behrens trainee's ultimate advancement to the position of salesman depends on, not only satisfactory completion of the training program, but also the fortuitous event of a sales opening. In other words, the termination point of the program . . . is subject to the vagaries of the business climate and the company's personnel needs.

"Second, the Behrens program is male dominated. No woman has ever participated in the program. While it is true that the issue of whether trainee positions should be open to women is a question to be ultimately resolved only in action under Title VII of the Civil Rights Act of 1964 . . . it is also true that 'training programs which appear to be available only to employees of one sex will . . . be carefully examined to determine whether such programs are, in fact, bona fide.' "

* * *

"The spirit behind the Equal Pay Act was eloquently depicted in Shultz v. Wheaton Glass Co., . . .

'The Act was intended as a broad charter of women's rights in the economic field. It sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it.'

"In light of this enunciation of the clear purpose of the Equal Pay Act, a training program coterminus with a stereotyped province called 'man's work' cannot qualify as a factor other than sex. . . .

"In the instant case, Behrens' president, Clifton, testified that women are not solicited as sales trainees because 'females were never considered as suitable for traveling.' This is a clear example of the attitude of male suitability designed to be nullified by the Equal Pay Act.

"Behrens' sales training procedure is not illusory, nor does it constitute a mere post-event justification for disparate wage payments. Nevertheless, the program has never included a female, and its completion—advancement to a sales job—is entirely dependent on personnel needs. These two program characteristics compel the conclusion that Behrens' training procedure is not a factor other than sex which should excuse denial of equal pay to female workers and remove them from the aegis of the Equal Pay Act."

Hodgson v. Robert Hall Clothes, Inc.

Excerpts from the decision of the U.S. Court of Appeals, Third Circuit (Philadelphia), 473 F. 2d 589 (1973). The Supreme Court refused to review this decision, 414 US 866 (1973).

(These excerpts deal with whether, under the Equal Pay Act, an employer can justify unequal pay for equal work by claiming the differential is related to economic benefit (higher profit) as a factor falling within "any other factor other than sex.")

"The Robert Hall store in question is located in Wilmington, Delaware. It sells clothing, and contains a department for men's and boys' clothing and another department for women's and girls' clothing. The store is a one-floor building, and the departments are in separate portions of it.

"The merchandise in the men's department was, on the average, of higher price and better quality than the merchandise in the women's department; and Robert Hall's profit margin on the men's clothing was higher than its margin on the women's clothing. Consequently, the men's department at all times showed a larger dollar volume in gross sales, and a greater gross profit. Breaking this down, the salespeople in the men's department, on the average, sold more merchandise in terms of dollars and produced more gross profit than did the people in the women's department per hour of work.

"The departments are staffed by full and part-time sales personnel. At all times, only men were permitted to work in the men's department and only women were permitted to work in the women's department. The complaint is not addressed to the propriety of such segregated employment.

"The salespeople receive a base salary and can earn additional incentive payments. . . . At all times, the salesmen received higher salaries than the saleswomen. Both starting salaries and periodic increases were higher for the males. The amount of incentive compensation was very slightly greater for the men."

* * *

"[The District Court held that] the sales personnel of each department performed equal work within the meaning of § 206(d)(1).

"The question then facing it was whether Robert Hall could prove that the wage 'differential was based on any other factor other than sex.'

* * *

"The initial question facing us is one raised by the Secretary. He contends that economic benefit to the employer cannot be used to justify a wage differential under § 206 (d)(1)(iv).

"He argues that 'any other factor' does not mean *any* other factor. Instead he claims it means any other factor other than sex which 'is related to job performance or is typically used in setting wage scales.' He contends that economic benefits to an employer do not fall within this exception."

* * *

"Robert Hall does not argue that 'any other' means 'any other' either. It claims that a wage differential is permissible if based on a legitimate business reason. As the district court found, economic benefits could justify a wage differential. We need go no further than to say the district court was correct. . . ."

* * *

"[S]tatistics proved that Robert Hall's wage differentials were not based on sex but instead fully supported the reasoned business judgment that the sellers of women's clothing could not be paid as much as the sellers of men's clothing. Robert Hall's executives testified that it was their practice to base their wage rates on these departmental figures.

"While no business reason could justify a practice clearly prohibited by the act, the legislative history . . . indicates a Congressional intent to allow reasonable business judgments to stand. It would be too great an economic and accounting hardship to impose upon Robert Hall the requirement that it correlate the wages of each individual with his or her performance. This could force it toward a system based totally upon commissions, and it seems unwise to read such a result into § 206 (d)(iv). Robert Hall's method of determining salaries does not show the clear pattern of discrimination . . . that would be necessary for us to make it correlate more precisely the salary of each of its employees to the economic benefit which it receives from them."

Nondiscrimination in Transfer

Rodriguez v. East Texas Motor Freight

Excerpt from the decision of the U.S. Court of Appeals, Fifth Circuit (New Orleans), 505 F. 2d 40 (1974).

(This excerpt deals with the qualifications an employer may require of individuals transferring to jobs they were previously excluded from by unlawful discriminatory requirements.)

"We have long subscribed in this circuit to the theory that those who suffer discrimination under Title VII must be permitted to take their 'rightful place' when job openings develop. . . . Thus, black and Mexican-American city drivers, many of whom would now be road drivers but for the discrimination of the defendants, must be given an opportunity to transfer to the road as road driving job openings develop.

"ETMF need not permit unqualified plaintiffs to transfer to the road, but in determining who is qualified ETMF must use criteria that either have no disparate impact along the lines of race or national origin, or that can be justified as a business necessity. We have already stated that the requirement of three years prior road haul experience must give way. Because road driving experience has been denied to blacks and Mexican-Americans as a class, and because ETMF has not justified the experience requirement as essential it may not be confined to road driving when to do so would discriminate against members of the plaintiff class. ETMF having failed to prove that three years' line-haul experience is a business necessity for transfer, each city driver must be considered to meet the experience requirement by showing three years of city driving on equipment similar to that used over the road.

"The plaintiffs argue that, because not all trucking companies require three years experience, we should also reduce the number of years experience required. . . . Once the requirement of *road* experience is removed, however, the experience requirement is not only *facially neutral*, it is *neutral in effect*. Thus it need not be justified as a business necessity. Congress did not intend that Title VII lead to uniform hiring practices across an industry. So long as hiring policies do not discriminate, Title VII does not require their modification.

"We hold, not that all minority city drivers with three years' experience at city driving must be permitted to transfer but only that they may not be excluded unless they fail to meet other qualifications that either have no disparate impact along racial or national-origin lines or that can be justified as essential for safety or efficiency.

On remand the district court should monitor carefully the criteria used by ETMF to prevent minority city drivers from transferring to line driving jobs.[28]"

Franks v. Bowman Transportation Company

Excerpt from the decision of the U.S. Court of Appeals, Fifth Circuit (New Orleans), 495 F. 2d 398 (1974). The Supreme Court has agreed to review this decision.

(This excerpt deals with the need for an employer to provide special remedial training opportunities to employees subject to past discrimination.)

"Appellants next ask that Bowman be ordered to establish special training programs to upgrade the skills of discriminatees and to facilitate their movement out of inferior jobs.

"Bowman's record of denying training opportunities to blacks is bad. From 1968 to 1971 Bowman hired 75 to 150 white OTR [over-the-road] drivers with no prior truck driving experience and trained them by assigning them to 'ride double' with experienced drivers. At the same time, assertedly because of the racial prejudice of all its white drivers, similar training opportunities were denied blacks. Prior to August of 1968 blacks were absolutely excluded from city driver jobs, which may lead to qualification for OTR jobs. In the Maintenance Department, black Tire Shop employees have been denied access to jobs through which they might progress to mechanic position.

"At a minimum, an effective remedy in this case must allow black applicants and new employees access to training opportunities on an equal basis with whites in the future. This requirement is implicit in the first paragraph of the district court's decree. It is little more than an echo of Title VII's general prohibition against discrimination in hiring and promoting. Further, if black Bowman employees who are presently locked into racial patterns due to past discrimination are to have a meaningful opportunity to advance, we think they must be afforded special temporary remedial training opportunities. A Tire Shop employee's seniority will be of little use to him in bidding on a mechanic's slot as long as he lacks the necessary skills. As the district court observed, 'as a practical matter, nobody in the tire shop can bump a mechanic.'

"Heretofore Bowman has trained its employees on the job. . . . On remand the district court should identify those positions which are training grounds, and impose conditions to ensure that a substantial number of Bowman's employees who have been discriminatorily relegated to inferior jobs in the past are afforded a ready access to them."

* * *

"In analogous employment discrimination cases, some courts have ordered the creation, at company expense, of counselling and training programs to which discriminatees must be admitted in certain numbers each year or according to a fixed ratio until they hold a certain percentage of the skilled positions. . . . If the district court should find . . . that further remedial measures are necessary to afford adequate training opportunities, it may fashion and grant them."

Wardlaw v. Austin School District

Excerpts from the decisions of the U.S. District Court, Western District of Texas, 10 FEP Cases 892 (1975).

(These excerpts deal with whether the transfer of an unwed, pregnant teacher of the mentally retarded to a nonteaching position constituted sex discrimination.)

"Prior to her transfer Plaintiff was a high school teacher of special education classes assigned to teach at LBJ High School. These classes are composed of some 8 or 10 mentally retarded children. Plaintiff is in the third year of her probationary status . . . and will be eligible for consideration for a 'permanent' three-year contract with the AISD at the end of the current school year. Prior to the incidents complained of herein Plaintiff's competence as a teacher was unquestioned and her performance at least satisfactory.

"In the fall of 1974 Plaintiff, a single female, learned that she was pregnant. The parties agree that Plaintiff intended to become pregnant and does not intend to marry. On November 15, 1974, Plaintiff notified the principal at LBJ, Ron Beauford, of her pregnancy. Mr. Beauford then unaware that Plaintiff was not married, advised Plaintiff that she could continue teaching as long as her health allowed. When . . . told that Plaintiff was not married he advised her that problems might arise, and suggested she notify Superintendent Davidson. . . .

"Ms. Wardlaw then wrote a letter to Dr. Davidson stating that . . . she wished to advise him of her pregnancy before sharing the news with her students. . . . On December 16, 1974, Dr. Davidson informed Plaintiff that he was transferring her, effective January 6, 1975, to the nonteaching position of special education materials and media assistant at the Kealing facility. The transfer was confirmed by a letter on December 18, 1974. . . ."

* * *

"Plaintiff contends that her transfer was the result of discrimination because of sex. Plaintiff presented, how-

[28] While the in-cab road test is undoubtedly a legitimate method for determining the qualifications of a driver, it may be subject to abuse unless the chances of a subjective judgment by the tester are minimized. . . . Moreover, a potential transferee who performs inadequately on this test should not be disqualified unless he cannot be expected to improve sufficiently given normal training."

ever, absolutely no evidence that she was treated any differently than would have been a single male teacher whose status as an expectant parent became known to school officials. Obviously, the physical fact that Plaintiff is a female assures that her pregnancy will become observable, while an unwed father has no such physical manifestation of his status. . . . We find no proscribed discrimination against Plaintiff because of her sex."

* * *

"Plaintiff contends that her fundamental rights to privacy, to procreate and to decide whether to marry or not to marry, as protected by the First, Ninth and Fourteenth Amendments, have been infringed by her transfer. These rights are, indeed, among those liberties protected by the Due Process Clause, and Defendants have never questioned Ms. Wardlaw's right to become pregnant, to have her child, or to decline to marry. What Defendants have done is to reach an administrative decision regarding Plaintiff's status as a high school special education teacher. The right Plaintiff claims is, in reality, the right to teach the class of her choosing. Such a right is secured to Plaintiff neither by the Constitution nor by her teaching contract.

"Evidence presented to the Court showed that Plaintiff's condition raised legitimate concern on the part of school officials regarding the impact of her presence on the educational process at LBJ High School generally, and particularly in her classroom. School officials feared that adverse public reaction to what might be considered, at least by large segments of society, to be Plaintiff's unconventional lifestyle was likely to cause disruption of the educational process at LBJ when and if Plaintiff's condition became public knowledge. Moreover, Plaintiff's position as a high school special education teacher brings into this case unique factors requiring careful consideration. At trial Defendants presented strong evidence that the special education students in Plaintiff's class possess characteristics which render them particularly needful of a learning environment free of the disruption, disturbance and tension likely to be engendered by any public controversy that might arise and has arisen concerning Plaintiff's status. Evidence further indicated that those students are mentally retarded children and might be particularly vulnerable to harm arising from any tension resulting from differences between their parents and their teacher regarding sexual attitudes and lifestyles.

"Thus, we conclude that the decision of school officials was justified by legitimate educational concerns. Their decision in no way reflected upon the morality or propriety of Plaintiff's lifestyle, only upon the impact of her presence in the classroom on the educational system. . . ."

* * *

". . . [T]he action taken by school officials reflects no punitive motivation. Plaintiff has not been deprived of her livelihood, has not been permanently barred from teaching in the AISD, and has not been denied consideration for a permanent contract with the AISD based upon her job performance. Her pay and all emoluments and benefits of her contract derived from the same are in no wise impaired or diminished."

Patterson v. Newspaper Mail Del. U. of N.Y. & Vic.

Excerpt from the decision of the U.S. Court of Appeals, Second Circuit (New York), 514 F. 2d 767 (1975).

(This excerpt deals with the objection of a white male to the terms of an agreement about transfers remedying past racial discrimination on the grounds that he personally has been just as disadvantaged as the minorities, so he should get the same benefits under the agreement.)

"Larkin's argument that he is entitled to the same benefits as the minority workers must also be rejected. This case arises under a statute which by its terms is limited to protection against employment discrimination based on an individual's 'race, color, religion, sex, or national origin.' . . . Larkin does not allege discrimination against him based on any of these factors. He argues only that the industry's past practices discriminated against all Group III members, minority and non-minority, and that while the settlement agreement remedies the discrimination against minority persons it fails to afford any relief for the harm caused to non-minority persons. Worse still, he asserts, the relief to minority persons is at the expense of the white Group III workers.

"At first glance this argument has much appeal. As the district court recognized, Group III workers were the victims of some practices that were harmful to all Group III members, regardless of race. Minority members, on the other hand, were the targets of racial discrimination on the part of the virtually all-white Union. In this Title VII action we are limited to consideration of the fairness of relief directed only to the latter. . . . [Title VII] creates no rights or benefits in favor of non-minority persons or groups. Any past denial of promotion rights to Larkin is clearly not remediable under Title VII. Indeed, Group III white workers have unsuccessfully sought relief for themselves under other statutes. It is thus apparent that Larkin has no right to any of the affirmative relief afforded to the minority groups, including the back pay provisions."

Nondiscrimination in Discharge

Brown v. D. C. Transit System, Inc.

Excerpts from the decision of the U.S. Court of Appeals, District of Columbia Circuit, 10 FEP Cases 841 (1975).

(These excerpts deal with whether an employer's discharge of some black males for failure to conform to the

company's grooming standards constitutes race and sex discrimination.)

"Plaintiffs had claimed that Regulation No. 70-67 would have forced them to modify their facial hair style ['mutton-chop' sideburns], and so was an 'extreme and gross suppression of them as black men and [was] a badge of slavery' depriving them 'of their racial identity and virility.' But there were 1800 employees, 1100 of whom were black, all others were white, indeed there were three women bus drivers. At the time the Plaintiffs were terminated, the regulation had been invoked against certain white drivers as well, at least one of whom had thereupon brought his facial hair style into conformity. The district judge specifically had found that there was no discrimination 'against persons because of their race or sex. . . .'

* * *

"Of course individual citizens have a constitutional right to wear beards, sideburns and mustaches in any form and to any length they may choose. But that is not a right protected by the Federal Government, by statute or otherwise, in a situation where a private employer has prescribed regulations governing the grooming of its employees while in that employer's service. The wearing of a uniform, the type of uniform, the requirement of hirsute conformity applicable to whites and blacks alike, are simply non-discriminatory conditions of employment falling within the ambit of managerial decision to promote the best interests of its business.

"Heretofore we have summed up the problem in terms of *private* employment thus:

'But equally it seems obvious to us, that one seeking an employment opportunity as in *our* situation where hair length readily can be changed, may be required to conform to reasonable grooming standards designed to further the employing company's interest by which that very opportunity is provided. There is no suggestion that the company regulation is pretextual or that it has been derived otherwise than in complete good faith.'

"We are aware that Transit may be distinguishable from a private employer who has extensive private competition and adopts grooming standards in the interest of keeping up with or gaining ground on that competition. But even a public utility with monopoly or quasi-monopoly status has an interest in consumer acceptance of its services. A utility's grooming regulation governing its employees does not have the nexus with the state necessary for its classification as 'state action' subject to due process restraints where, as here, there has been no involvement whatever of an agency of government, federal or 'state.' We find here no order, no investigation and hearing, not even an application to the agency to determine whether it could or should consider the possibility that some element of the public interest was adversely affected by the company's regulation.

"We are satisfied that the district judge correctly concluded that Plaintiffs were entitled to no relief under . . . [The Civil Rights Acts of 1866, 1871, and 1964]. We are equally confident that there has been no 'state action,' such as is essential to establish a claim of denial of due process under the Fifth Amendment. Accordingly, on this aspect of the case, we will reverse and remand with directions that judgment be entered in favor of the appellants and that Plaintiffs' complaint be dismissed."

Emporium Capwell Co. v. Western Addition Community Organization

Excerpts from the decision of the Supreme Court of the United States, 95 U.S. 977 (1975).

(These excerpts deal with an employer's right, under the Labor Management Relations Act, to discharge employees for picketing and urging a consumer boycott to force employer to bargain with them over issues of employment discrimination. The employees' union, which had exclusive collective bargaining rights, had already taken their claims to arbitration.)

"Before turning to the central questions of labor policy raised by this case, it is important to have firmly in mind the character of the underlying conduct to which we apply them. . . . [T]he Trial Examiner and the Board found that the employees were discharged for attempting to bargain with the Company over the terms and conditions of employment as they affected racial minorities. . . . We see no occasion to disturb the finding of the Board. . . . The issue, then, is whether such attempts to engage in separate bargaining are protected by § 7 of the Act or proscribed by § 9(a).

A

"Section 7 affirmatively guarantees employees the most basic rights of industrial self-determination, 'the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,' as well as the right to refrain from these activities. These are, for the most part, collective rights, rights to act in concert with one's fellow employees; they are protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife 'by encouraging the practice and procedure of collective bargaining'. . . .

"Central to the policy of fostering collective bargaining, where the employees elect that course, is the principle of majority rule. . . . In establishing a regime of majority rule, Congress sought to secure to all members of the unit

the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority. . . . As a result, '[t]he complete satisfaction of all who are represented is hardly to be expected.'

"In vesting the representatives of the majority with this broad power Congress did not, of course, authorize a tyranny of the majority over minority interests. First, it confined the exercise of these powers to the context of a 'unit appropriate for the purposes of collective bargaining,' i.e., a group of employees with a sufficient commonality of circumstances to ensure against the submergence of a minority with distinctively different interests in the terms and conditions of their employment. . . . Second, it undertook in the 1959 Landrum-Griffin amendments . . . to assure that minority voices are heard as they are in the functioning of a democratic institution. Third, we have held, by the very nature of the exclusive bargaining representative's status as representative of all unit employees, Congress implicitly imposed upon it a duty fairly and in good faith to represent the interests of minorities within the unit. . . . And the Board has taken the position that a union's refusal to process grievances against racial discrimination, in violation of that duty, is an unfair labor practice. . . . Indeed, the Board has ordered a union implicated by a collective bargaining agreement in discrimination with an employer to propose specific contractual provisions to prohibit racial discrimination. . . .

B

"Against this background of long and consistent adherence to the principle of exclusive representation tempered by safeguards for the protection of minority interests, respondent urges this Court to fashion a limited exception to that principle: employees who seek to bargain separately with their employer as to the elimination of racially discriminatory employment practices peculiarly affecting them, should be free from the constraints of the exclusivity principle of § 9(a). Essentially because established procedures under Title VII or, as in this case, a grievance machinery, are too time-consuming, the national labor policy against discrimination requires this exception, respondent argues, and its adoption would not unduly compromise the legitimate interests of either unions or employers."

* * *

"This argument confuses the employees' substantive right to be free of racial discrimination with the procedures available under the NLRA for securing these rights. Whether they are thought to depend upon Title VII or have an independent source in the NLRA, they cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA. . . .

* * *

". . . [W]e think neither aspect of respondent's contention in support of a right to short-circuit orderly, established processes for eliminating discrimination in employment is well-founded. The policy of industrial self-determination as expressed in § 7 does not require fragmentation of the bargaining unit along racial or other lines in order to consist with the national labor policy against discrimination. And in the face of such fragmentation, whatever its effect on discriminatory practices, the bargaining process that the principle of exclusive representation is meant to lubricate could not endure unhampered.

"Even if the NLRA, when read in the context of the general policy against discrimination, does not sanction these employees' attempt to bargain with the Company, it is contended that it must do so if a specific element of that policy is to be preserved. The element in question is the congressional policy of protecting from employer reprisal employee efforts to oppose unlawful discrimination, as expressed in § 704(a) of Title VII. . . . Since the discharge[d] employees here had, by their own lights, 'opposed' discrimination, it is argued that their activities 'fell plainly within the scope of,' and their discharges therefore violated, § 704(a). The notion here is that if the discharges did not also violate § 8(a)(1) of NLRA, then the integrity of § 704(a) will be seriously undermined. We cannot agree.

"Even assuming that § 704(a) protects employees' picketing and instituting a consumer boycott of their employer [In a footnote the Court notes that the validity of such an assumption is by no means clear-cut.], the same conduct is not necessarily entitled to affirmative protection from the NLRA. Under the scheme of that Act, conduct which is not protected concerted activity may lawfully form the basis for the participants' discharge. That does not mean that the discharge is immune from attack on other statutory grounds in an appropriate case. If the discharges, in this case are violative of § 704(a) of Title VII, the remedial provisions of that title provide the means by which Hollins and Hawkins may recover their jobs with back pay."

Cummins v. Parker Seal Company

Excerpts from the decision of the U.S. Court of Appeals, Sixth Circuit (Cincinnati), 516 F. 2d 544 (1975).

(These excerpts deal with a company's discharge of a supervisor who, in observance of his Sabbath, refused to work on Saturday.)

"On this record, we see no substantial evidence to support the District Court's conclusion that accommodation of Appellant's religious practices would have imposed an undue hardship on the conduct of Appellee's business. The objections and complaints of fellow employees, in and of themselves, do not constitute undue hardship in the conduct of an employer's business. If employees are disgruntled

because an employer accommodates its work rules to the religious needs of one employee, under EEOC Regulation 1605 and . . . [Title VII, as amended] such grumbling must yield to the single employee's right to practice his religion. Moreover, the fact that Saturday Sabbath observance by one employee forces other employees to substitute during weekend hours does not demonstrate an undue hardship on the employer's business. It is conceivable that employee morale problems could become so acute that they would constitute an undue hardship. The EEOC, in interpreting Regulation 1605, has noted the possibility of undue hardship when the employer can make a persuasive showing that employee discontent will produce 'chaotic personnel problems.' . . .

"In the case at bar, however, Appellee has shown no such dire effect upon the operation of its business. To the contrary, the complaints of Appellant's fellow supervisors seem both mild and infrequent. In addition, it appears that Appellee might have alleviated at least some of the dissension if it had pursued a more active course of accommodation. For example, Appellee's officials could have required Appellant to work longer hours on week days or on Sundays. They could have reduced Appellant's salary commensurately with his shorter work week. They could have taken pains to ensure that Appellant substituted for his colleagues on an equitable basis rather than assuming that the co-workers would make appropriate demands upon Appellant.

"Appellee was inconvenienced by Appellant's no-Saturdays rule, but to call the inconvenience shown on this record 'undue hardship' would be to venture into 'an Alice-in-Wonderland world where words have no meaning.' . . . Undue hardship is something greater than hardship, and Appellee did not demonstrate . . . how accommodation to Appellant's religious practices would have imposed an unreasonable strain on its business, having lived with the situation for over one year before Appellant's discharge."

* * *

"Appellee seeks to sustain the District Court's decision upon the ground that . . . [the EEOC regulation and Title VII] are laws 'respecting an establishment of religion' and therefore invalid under the first amendment. Appellee argues that the reasonable accommodation rule fosters religion by requiring private employers to defer to their employees' religious idiosyncrasies. Appellee points out that under the rule an employer may be required to excuse an employee from Saturday work to attend church, but an atheistic employee who wishes to go fishing on Saturdays enjoys no similar right under the Civil Rights Act. Thus Appellee believes the rule constitutes a governmentally mandated preference for religion that is impermissible under the first amendment."

* * *

"The Supreme Court has made it clear that a law is not necessarily unconstitutional merely because it confers incidental or indirect benefits upon religious institutions. . . . In our view, the primary effect of Regulation 1605 and § 2000e(j) is to inhibit discrimination, not to advance religion."

* * *

"In summary, we hold that the reasonable accommodation rule is not inconsistent with the establishment clause of the first amendment. Accordingly, we find no constitutional basis for sustaining the District Court's decision. Since we have concluded that Appellant was the victim of religious discrimination within the meaning of Title VII, we must remand the case for a determination of the appropriate relief. At this point we simply note that the District Court should consider reinstatement, back pay, and attorney's fees."

McDonald v. Santa Fe Trail Transp. Co.

Excerpt from the decision of the U.S. Court of Appeals, Fifth Circuit (New Orleans), 513 F.2d 90 (1975). The Supreme Court has been asked to review this decision.

(This excerpt deals with whether white employees, dismissed for misappropriating company property when a similarly charged black employee was not dismissed, can bring suit charging racial discrimination.)

". . . [The Civil Rights Act of 1866] gives all persons within the jurisdiction of the United States the same right to equal benefit of the laws 'as is enjoyed by white citizens.' The district court held that this section confers no actionable rights upon white persons, and dismissed for lack of jurisdiction the § 1981 claim brought by the two white plaintiffs. We affirm. . . .

"We likewise agree with the district court's conclusion that an employer's dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged black employee does not raise a claim upon which relief may be granted under Title VII. . . . There is no allegation that the plaintiffs were falsely charged. Disciplinary action for offenses not constituting crimes is not involved in this case."

Nondiscrimination in Reemployment

Newmon v. Delta Air Lines, Inc.

Excerpts from the decision of the U.S. District Court, Northern District of Georgia, 374 F. Supp. 238 (1973).

(These excerpts deal with whether a company's failure to reemploy a woman after her maternity leave constituted sex discrimination.)

". . . [T]he defendant's maternity policy is attacked as discriminatory because it permits those on such leave to

be permanently replaced although they are granted priority for future employment and retain their benefits based on length of service. Other cases dealing with Title VII sex discrimination have declared as illegal the refusal to hire mothers. . . . It arguably appears then that a refusal rehire in an available similar job also would be violative of the Act, unless it can be shown that such refusal was dictated by business necessity, a limited exception to the Act's command against discrimination. . . .

"The applicability of the 'business necessity' doctrine depends upon much more than just convenience. . . . For such a policy as Delta's to be maintainable, it must promote efficiency of operation and be indispensible toward that end. . . . In an earlier case construing the 'business necessity' rule, the Fifth Circuit Court of Appeals specifically noted that '[w]hen the defendant's conduct evidences an economic purpose there is no discrimination under Title VII. . . .' "

* * *

"Delta justifies its failure to rehire the plaintiff on the ground, among others, that it cannot obtain temporary replacements for pregnant employees and that holding such a large number of positions open for women on maternity leave would be demoralizing to the remainder of its work force. . . ."

* * *

"Of greater importance, however, is the evidence that the plaintiff was not rehired because of a business 'slump' at the time which affected Delta and others in the air travel industry. In fact, the plaintiff's old job was later abolished as a result of this adverse economic impact. This reality is substantiated by the failure of the plaintiff to obtain employment with any other Atlanta-based airlines, even though she was experienced in a phase of that business. Therefore, the evidence is uncontradicted that Delta's failure to reemploy the plaintiff was dictated by business prudence rather than sex discrimination."

Government Release of Affirmative Action Plan Information

Sears, Roebuck & Co. v. GSA

Excerpt from the decision of the U.S. Court of Appeals, District of Columbia Circuit, 509 F. 2d 527 (1974).

(This excerpt deals with a government contractor's attempt to prevent the Federal Government from releasing, under the Freedom of Information Act, *any* of the affirmative action plan information it had filed.)

"Sears, Roebuck & Company brought this action in the District Court, seeking to prevent disclosure under the Freedom of Information Act . . . of EEO-1 forms and Affirmative Action Plans (AAP's) which Sears, as a government contractor, has been required to submit to the General Services Administration (GSA) and to the Office of Federal Contract Compliance, Department of Labor (OFCC) by Executive Order No. 11246 . . . as amended . . . and regulations promulgated thereunder. Disclosure is sought by Intervenor Council on Economic Priorities, a non-profit corporation which is currently preparing a study of the comparative social performance of five major national retailers, including Sears. GSA and the OFCC, having first consulted the FOIA Committee of the Department of Justice, were willing to release the documents. These agencies offered Sears an opportunity to review the documents and point out any portions which were exempt from disclosure under either the FOIA or the OFCC disclosure regulations . . . Sears declined to follow this procedure because it maintained that the documents were *wholly* exempt under FOIA exemptions § 552(b)(3) (specifically exempted by statute) and § 552(b)(7) (investigatory files compiled for law enforcement purposes). Therefore it sought in District Court an injunction restraining the government from disclosing any of the information. . . .

"In an extremely careful and thorough opinion . . . Judge Bryant held that the documents were not exempt either under (b)(3) or (b)(7) and, as to those claims, granted summary judgment for the government and the intervenor. However, because Sears argued in the alternative that large portions of the documents were exempt under (b)(4) and (b)(6), but had never specified for the government which portions it believed those sections protected, Judge Bryant stayed disposition of those claims pending agency review. Sears was directed to submit its (b)(4) and (b)(6) claims to GSA within 30 days; GSA, in turn, was ordered to release all portions of the information *not* brought to its attention by Sears in those claims.

". . . [O]ne who seeks a stay [of a lower court's order must] demonstrate a strong likelihood of success on the merits. This Sears has failed to do. . . ."

* * *

"The EEO-1's herein were collected by the Joint Reporting Committee (JRC), which collects documents for and distributes them to both the EEOC and the OFCC. Although under some circumstances the EEOC does require the submission of EEO-1's, which the JRC collects for it, Judge Bryant correctly held that all of the documents herein were obtained by the JRC pursuant to Executive Orders 11246 and 11375 and *not* pursuant to the Commission's authority under Title VII. Further, members of the JRC are not officers or employees of the Commission. While the JRC may be an agent of the Commission when it acts for the Commission, it is an agent of the OFCC when it collects information for that agency pursuant to Executive Order 11246. Thus, the data in question here was not collected by the EEOC, nor was it obtained pursuant to EEOC authority. . . .

"The EEO-1's and AAP's which Sears, as a government contractor, was required to supply in order that its compliance with executive orders prohibiting employment discrimination could be monitored are not 'investigatory files' and are not exempt from disclosure. . . .

"Therefore, . . . GSA is directed to release forthwith all of the information sought herein which Sears has not specified as exempt under FOIA exemptions (b)(4) and (b)(6)."

Westinghouse Electric Corporation v. Schlesinger

Excerpt from the decree issued by the U.S. District Court, Eastern District of Virginia, 392 F. Supp. 1246 (1974).

(This is an excerpt from a court order permanently restraining the Federal Government, under the Freedom of Information Act, from releasing to civil rights groups certain information two government contractors had filed in their Affirmative Action Plans.)

"[T]he Court having heard oral evidence in open court concludes that Defendants are about to release copies of Plaintiff Fraser & Johnston's 1972 Affirmative Action Program and copies of Plaintiff Westinghouse's 1972 EEO-1 report for its East Pittsburgh Divisions . . . and will do so unless restrained by order of this Court, and from information contained therein the Plaintiffs' profit margin and resulting vulnerability to price change can be extrapolated, and that viewing the same documents over a period of time would enable a competitor to obtain a forewarning on new products and process changes being undertaken by the Plaintiffs, all to Plaintiffs' immediate and irreparable injury, loss or damage, and the disclosure of certain information contained in said documents would be unauthorized under 18 U.S.C. § 1905, and that the documents in question contain commercial or financial information which is confidential within the meaning of 5 U.S.C. § 552(b)(4), therefore

"IT IS ORDERED, ADJUDGED AND DECREED that the Defendants, and each of them, and their successors in office, their agents, confederates, servants, and all employees and others acting in concert with or for them are permanently enjoined and restrained from releasing or disclosing any information contained in that part of the 1972 EEO-1 report filed by Westinghouse for its East Pittsburgh Divisions . . . which is under the heading "Section D—EMPLOYMENT DATA" to any party other than Plaintiffs and authorized agencies of the federal government." [The disclosable information was listed by the Court.]

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendants, and each of them, and their successors in office, their agents, confederates, servants, and all employees and others acting in concert with or for them are permanently enjoined and restrained from releasing or disclosing any information contained in Fraser & Johnston's 1972 Affirmative Action Program, except such portions which Plaintiffs have heretofore specifically permitted Defendants to release, to any party other than Plaintiffs and authorized agencies of the federal government." [The disclosable information was listed by the Court.]

Hughes Aircraft Company v. Schlesinger

Excerpts from the decision of the U.S. District Court, Central District of California, 384 F. Supp. 292 (1974).

(These excerpts deal with a government contractor's attempt to prevent the Federal Government, under the Freedom of Information Act, from releasing its Affirmative Action Plan on the grounds it contains "confidential" trade secrets and commercial and financial information.)

"As a government defense contractor, Hughes Aircraft is under an obligation to be an equal opportunity employer. To demonstrate good faith in its employment practices, Hughes, like other defense contractors, must submit an Affirmative Action Plan (AAP) to the Labor Department's Office of Federal Contract Compliance. . . . The AAP must discuss in depth and in a candid fashion the minority hiring, firing and promotion policies of the Company. It must also provide statistical data on previous practices as well as future projections and goals for minority employment policies, and must be openly self critical and fully discuss problem areas.

Hughes submitted its 1974 Culver City plant AAP to the office of the office of Federal Contract Compliance. Invoking the Freedom of Information Act, . . . the Los Angeles Chapter of the National Organization for Women requested a copy of that document from one of the defendants and Hughes brought this action to prevent disclosure."

* * *

"[The Freedom of Information Act] exempts 'trade secrets and commercial or financial information obtained from a person and privileged or confidential.' . . . [The OFCC Regulation implements this law and] regulates access to records, including AAP's filed with the Office of Federal Contract Compliance.

"The key factor in both . . . is an understanding of what information in the AAP is protected because it is 'confidential.'

"[Another court has] formulated the following test:

'. . . commercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. . . .'

"This test is appropriately applied here, to the release of Hughes' AAP.

"The issue is whether disclosure of the Hughes AAP is likely to cause substantial harm to Hughes' competitive position. To help resolve this question, the court has studied the Hughes AAP *in camera* and has requested that the parties submit affidavits of experts."

* * *

"The debate concentrates on the question of whether Hughes' labor costs can be uncovered by a competitor, since the AAP reveals the number of employees at the Hughes Culver City facility. The argument is that once a competitor knows Hughes' labor costs, the competitor, having also found Hughes' costs for plant, equipment, and materials, and its profit margin, will be able to underbid Hughes on government contracts. Hughes' expert, Rutenberg, argues that the listing of employees by job categories helps rivals estimate labor costs, since competitive rates in a locality for wage, salary and fringe benefits can be known.

"Government's expert, Welch, on the other hand, believes that labor costs can only be imperfectly estimated, since wage information is omitted from the AAP. He also points out that wage information within a job classification will vary and thus any estimation will be subject to 'considerable error.' Welch also points out that the bids of a successful government contractor are open for inspection to the losers, and he believes that competitors can get a far more accurate assessment of costs this way, than can be obtained by analyzing the employment patterns of a firm as a whole. . . . He observes that 'both wages and manpower requirements are necessary, and neither is contained in AAP.'

"The government's other expert, Flanagan, adds that wages within a job classification vary, and 'it is not possible for a competitor with access to the AAP to guess whether wages paid by Hughes are in the upper or lower part of the dispersion.'

"Surprisingly, Hughes reveals through its witness, Wajda, that it participates in private, industry wide range and salary surveys which involve 'an exchange of information with a select sample of companies in the industry . . .' Wajda notes that 'the data includes actual salary ranges, and averages by job classification.'

"The question remains whether salary ranges and averages are helpful for competitors estimating labor costs, since only certain persons within a job classification may be working on a project. As Welch and Flanagan point out, different divisions of Hughes might participate in a project, subcontractors may be involved, and manpower needs are still undisclosed.

"However, this revelation by the plaintiff raises new considerations for this equity court. Weighing heavily in the equitable balance is this apparent collusion between Hughes and its alleged competitors. Hughes' involvement in this cooperative salary survey challenges the claim that Hughes is really worried about its competitive position, should its AAP be disclosed. After studying the AAP, I tend to believe that Hughes is more concerned about embarrassment, should the AAP be made public.

"[The OFCC regulation] notes that only 'those portions of the AAP which constitute information on staffing patterns and pay scales' should be exempt from disclosure, 'but only to the extent that their release would injure the business or financial position of the contractor . . .' Hughes has voluntarily released a significant piece of its total labor costs picture . . . Hughes' behavior with its competitors is a strange way of preserving a financial confidentiality it now so strongly seeks to assert."

* * *

"The Hughes experts also consider other questions besides labor costs, although with less emphasis.

"Rutenberg believes that disclosure of data which indicates a turnover of employees might show dissatisfaction with the company, and thus encourage raiding by competitors. However, many inferences can be drawn from such disclosure. It might be an indication of the availability of employment with Hughes. Also, do competitors only raid during signs of dissatisfaction, or is it an ongoing practice? Lastly, the report doesn't indicate which employees are dissatisfied and amenable to raiding.

"Rutenberg also believes that disclosure of a low turnover rate might indicate that the facility is preparing for a major bidding activity. Low turnover, however, might indicate a tight job market with employees being especially conscious of job security, and thus being unwilling to move on.

"Hughes' expert, Kamien, believes that minorities might be discouraged by the Hughes' minority and women employment picture. However as government's expert, Vickery, points out, disclosure of Affirmative Action Plans can serve a search and recruitment purpose, and help companies such as Hughes, comply with the wishes of the government. She believes that informational barriers to job possibilities will be lowered and that the fear of rejection, often held by potential applicants, will be greatly reduced. Women and minority perceptions of the types of jobs open to them will be changed by public release of the AAP and disclosure will also direct these groups to job opportunities."

* * *

"The government's showing has convinced me of the marginal utility of the Hughes' AAP to a competitor.

Additionally, the revelation of the private, industry wide surveys discredits much of the basis for finding any com-

petitive harm to Hughes, and the apparent collusion is most persuasive for the equitable balancing that must be done in these circumstances."

". . . [The OFCC regulation] exempts from disclosure those portions of Affirmative Action Plans which 'would constitute a release of confidential financial information of an employee or would constitute an unwarranted invasion of the privacy of an employee.' Thus, the following portions of the Hughes Culver City AAP are exempt from disclosure: (1) The entire section designated 'Minorities and Females Eligible for Upgrade and Promotion' and (2) 'Minorities and Females Possessing College Degrees,' etc. . . . The remainder of the Plan is subject to disclosure.

"Judgment is ordered accordingly."

Appendix B*
Texts of Regulations, as Amended

Provisions from The Constitution of the United States

The following Constitutional Amendments have been regarded as relevant to employment discrimination.

Amendment 5

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment 14

"*Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

"*Section 5.* The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Civil Rights Acts of 1866, 1870, and 1871

(These acts have been codified as Title 42, Chapter 21, Sections 1981-1983 in the U.S. Code. For a brief comparison of the enforcement proceedings under these acts and under Title VII of the Civil Rights Act of 1964, see the excerpts on pages 33-34 from the decision of the Supreme Court in Johnson v. Railway Express Agency, Inc., *10 FEP cases 817 [May 19, 1975].)*

§ 1981. Equal rights under the law.

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

§ 1982. Property rights of citizens.

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

§ 1983. Civil action for deprivation of rights.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Civil Rights Act of 1964, as Amended

AN ACT To enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That this Act may be cited as the "Civil Rights Act of 1964."

*See also Appendix B in Report No. 589.

* * *

TITLE VI—NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS

SEC. 601. No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

SEC. 602. Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 601 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

SEC. 603. Any department or agency action taken pursuant to section 602 shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 602, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with section 10 of the Administrative Procedure Act, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that section.

SEC. 604. Nothing contained in this title shall be construed to authorize action under this title by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

SEC. 605. Nothing in this title shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

TITLE VII—EQUAL EMPLOYMENT OPPORTUNITY[1]

DEFINITIONS

SEC. 701. For the purposes of this title—

(a) The term "person" includes one or more individuals, *governments, governmental agencies, political subdivisions,* labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has *fifteen* or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or *any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code), or* (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954, *except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972,* persons having fewer than *twenty-five* employees (and their agents) shall not be considered *employers.*

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any or-

[1] Includes 1972 amendments made by P.L. 92-261 printed in italic.

ganization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) *twenty-five* or more during the first year after the *date of enactment of the Equal Employment Opportunity Act of 1972, or* (B) *fifteen* or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, *except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.*

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, *and further includes any governmental industry, business, or activity.*

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's, religious observance or practice without undue hardship on the conduct of the employer's business.

EXEMPTION

SEC. 702. This title shall not apply to an employer with respect to the employment of aliens, outside any State, or to a religious corporation, association, *educational institution,* or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, *educational institution,* or society of its *activities.*

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

SEC. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees *or applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for em-

ployment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, *or applicants for membership* or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this title, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

(i) Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

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(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

OTHER UNLAWFUL EMPLOYMENT PRACTICES

SEC. 704. (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, *or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs,* to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

(b) It shall be an unlawful employment practice for an employer, labor organization, employment *agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs,* to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment *agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee* indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SEC. 705. (a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. *Members of the Commission* shall be appointed by the President by and with the advice and consent of the *Senate* for a term of five *years. Any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed, and all members of the Commission shall continue to serve until their successors are appointed and qualified, except that no such member of the Commission shall continue to serve (1) for more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.* The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and *except as provided in subsection (b),* shall appoint, in accordance with the *provisions of title 5, United States Code, governing appointments in the competitive service, such officers, agents, attorneys, hearing examiners, and employees as he deems necessary to assist it in the performance of its functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, relating to classification and General Schedule pay rates: Provided, That assignment, removal, and compensation of hearing examiners shall be in accordance with sections 3105, 3344, 5362, and 7521 of title 5, United States Code.*

(b) (1) There shall be a General Counsel of the Commission appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel shall have responsibility for the conduct of litigation as provided in sections 706 and 707 of this title. The General Counsel shall have such other duties as the Commission may prescribe or as may be provided by law and shall concur with the Chairman of the Commission on the appointment and supervision of regional attorneys. The General Counsel of the Commission on the effective date of this Act shall continue in such position and perform the functions specified in this subsection until a successor is appointed and qualified.

(2) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, provided that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to this title.

(c) A vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission and three members thereof shall constitute a quorum.

(d) The Commission shall have an official seal which shall be judicially noticed.

(e) The Commission shall at the close of each fiscal year

report to the Congress and to the President concerning the action it has taken; the names, salaries, and duties of all individuals in its employ and the moneys it has disbursed; and shall make such further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable.

(*f*) The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any or all its powers at any other place. The Commission may establish such regional or State offices as it deems necessary to accomplish the purpose of this title.

(*g*) The Commission shall have power—

(1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;

(2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this title such technical assistance as they may request to further their compliance with this title or an order issued thereunder;

(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this title, to assist in such effectuating by conciliation or such other remedial action as is provided by this title:

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this title and to make the results of such studies available to the public;

(6) to *intervene* in a civil action brought *under section 706* by an aggrieved party *against a respondent other than a government, governmental agency, or political subdivision.*

(*h*) The Commission shall, in any of its educational or promotional activities, cooperate with other departments and agencies in the performance of such educational and promotional activities.

(*i*) All officers, agents, attorneys, and employees of the Commission shall be subject to the provisions of section 9 of the Act of August 2, 1939, as amended (the Hatch Act), notwithstanding any exemption contained in such section.

PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES

SEC. 706. (*a*) *The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title.*

(*b*) Whenever *a charge is filed by or on behalf of a* person claiming to be aggrieved, or by a member of the Commission, *alleging* that an employer, employment agency, labor *organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs,* has engaged in an unlawful employment practice, the Commission shall *serve a notice, of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on* such employer, employment agency, labor *organization, or joint labor-management committee* (hereinafter referred to as the "respondent") *within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges* shall not be made public by the Commission. If the Commission *determines* after such investigation that there is *not* reasonable cause to believe that the charge is true, *it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true,* the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such *informal* endeavors may be made public by the *Commission, its officers or employees, or used as evidence in a subsequent proceeding* without the written consent of the *persons concerned.* Any *person* who *makes* public information in violation of this subsection shall be fined not more than $1,000 or imprisoned *for* not more than one *year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) from the date upon which the Commission is authorized to take action with respect to the charge.*

(*c*) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to

have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(*d*) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective *date* of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) A charge under *this section* shall be filed within *one hundred and eighty* days after the alleged unlawful employment practice *occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter*, except that in *a* case of an unlawful employment practice with respect to which the person aggrieved has *initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof*, such charge shall be filed by *or on behalf of* the person aggrieved within *three hundred* days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(*f*)(*1*) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (*c*) *or* (*d*), the Commission has been unable to *secure from the respondent a conciliation agreement acceptable to the Commission*, the Commission *may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has notified a civil action in a case involving a government, governmental agency, or political subdivision or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may* be brought against the respondent named in the charge (A) by the person claiming to be aggrieved, or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the *Commission*, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action *upon certification* that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections *(c) or (d) of this section or further* efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered,

or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

(h) The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U.S.C. 101-115) shall not apply with respect to civil actions brought under this section.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under *this section*, the Commission may commence proceedings to compel compliance with such order.

(j) Any civil action brought under *this section* and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code.

(k) In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

SEC. 707. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

(c) Effective two years after the date of enactment of the Equal Employment Opportunity Act of 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9, of title 5, United States Code, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Subsequent to the date of enactment of the Equal Employment Opportunity Act of 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 706 of this Act.

EFFECT ON STATE LAWS

SEC. 708. Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

INVESTIGATIONS, INSPECTIONS, RECORDS, STATE AGENCIES

SEC. 709. (a) In connection with any investigation of a charge filed under section 706, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation.

(b) The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this title and within the limitation of funds appropriated specifically for such purpose, *engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and* utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, *pay by advance or reimbursement* such agencies and their employees for services rendered to assist the Commission in carrying out this title. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this title.

(c) *Every* employer, employment agency, and labor organization subject to this title shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom, as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this title or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this title which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purpose of this title, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and *to* furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, *and, if such application for an exemption is denied,* bring a

civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. *If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.*

(d) In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection.

(e) It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

INVESTIGATORY POWERS

Sec. 710. For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 11 of the National Labor Relations Act (49 Stat. 455; 29 U.S.C. 161) shall apply.

NOTICES TO BE POSTED

SEC. 711. (a) Every employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from, or summaries of, the pertinent provisions of this title and information pertinent to the filing of a complaint.

(b) A willful violation of this section shall be punishable by a fine of not more than $100 for each separate offense.

VETERANS' PREFERENCE

SEC. 712. Nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

RULES AND REGULATIONS

SEC. 713. (a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title. Regulations issued under the section shall be in conformity with the standards and limitations of the Administrative Procedure Act.

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this title if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this title regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this title.

FORCIBLY RESISTING THE COMMISSION OR ITS REPRESENTATIVES

SEC. 714. The provisions of *sections 111 and 1114* title 18, United States Code, shall apply to officers, agents, and employees of the Commission in the performance of their official duties. *Notwithstanding the provisions of sections 111 and 1114 of title 18, United States Code, whoever in violation of the provisions of section 1114 of such title kills a person while engaged in or on account of the performance of his official functions under this Act shall be punished by imprisonment for any term of years or for life.*

EQUAL EMPLOYMENT OPPORTUNITY COORDINATING COUNCIL

Sec. 715. There shall be established an Equal Employment Opportunity Coordinating Council (hereinafter referred to in this section as the Council) composed of the

Secretary of Labor, the Chairman of the Equal Employment Opportunity Commission, the Attorney General, the Chairman of the United States Civil Service Commission, and the Chairman of the United States Civil Rights Commission, or their respective delegates. The Council shall have the responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. On or before July 1 of each year, the Council shall transmit to the President and to the Congress a report of its activities, together with such recommendations for legislative or administrative changes as it concludes are desirable to further promote the purposes of this section.

EFFECTIVE DATE

SEC. 716. (a) This title shall become effective one year after the date of its enactment.

(b) Notwithstanding subsection (a), sections of this title other than sections 703, 704, 706, and 707 shall become effective immediately.

(c) The President shall, as soon as feasible after the enactment of this title, convene one or more conferences for the purpose of enabling the leaders of groups whose members will be affected by this title to become familiar with the right afforded and obligations imposed by its provisions, and for the purpose of making plans which will result in the fair and effective administration of this title when all of its provisions become effective. The President shall invite the participation in such conference or conferences of (1) the members of the President's Committee on Equal Employment Opportunity, (2) the members of the Commission on Civil Rights, (3) representatives of State and local agencies engaged in furthering equal employment opportunity, (4) representatives of private agencies engaged in furthering equal employment opportunity, and (5) representatives of employers, labor organizations, and employment agencies who will be subject to this title.

NONDISCRIMINATION IN FEDERAL GOVERNMENT EMPLOYMENT

Sec. 717. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Within thirty days of receipt of notice of final action

taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex, or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) The provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder.

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

SPECIAL PROVISIONS WITH RESPECT TO DENIAL, TERMINATION, AND SUSPENSION OF GOVERNMENT CONTRACTS

Sec. 718. No Government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer full hearing and adjudication under the provisions of title 5, United States Code, section 554, and the following pertinent sections: Provided, That if such employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply: Provided further, That for the purposes of this section an affirmative action plan shall be deemed to have been accepted by the Government at the time the appropriate compliance agency has accepted such plan unless within forty-five days thereafter the Office of Federal Contract Compliance has disapproved such plan.

Title IX of the Educational Amendments of 1972, P.L. 92-318

(This Title has been codified as Title 20, Chapter 38 in the U.S. Code. It prohibits sex discrimination in employment and programing as well as in admissions.)

§ 1681. Sex.

"(a) Prohibition against discrimination; exceptions.

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

"(1) Classes of educational institutions subject to prohibition.

In regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

"(2) Educational institutions commencing planned change in admissions.

In regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;

"(3) Educational institutions of religious organizations with contrary religious tenets.

This section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

"(4) Educational institutions training individuals for military services or merchant marine.

This section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine; and

"(5) Public educational institutions with traditional and continuing admissions policy.

In regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex.

"(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance.

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

"(c) Educational institution defined.

For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department."

§ 1682. Federal administrative enforcement; report to congressional committees.

"Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report."

* * *

§ 1683. Judicial review.

"Any department or agency action taken pursuant to section 1682 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 1682 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that title."

* * *

§ 1684. Blindness or visual impairment; prohibition against discrimination.

"No person in the United States shall, on the ground of blindness or severely impaired vision, be denied admission in any course of study by a recipient of Federal financial assistance for any education program or activity, but nothing herein shall be construed to require any such institution to provide any special services to such person because of his blindness or visual impairment."

* * *

§ 1685. Authority under other laws unaffected.

"Nothing in this chapter shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty."

* * *

§ 1686. Interpretation with respect to living facilities.

"Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes."

The State and Local Fiscal Assistance Act of 1972, P.L. 92-512

(This Act, sometimes called the Federal Revenue Sharing Act, has been codified as Title 31, Chapter 24 in the U.S. Code. Subchapter II specifically deals with nondiscrimination.)

SUBCHAPTER II—ADMINISTRATIVE PROVISIONS

§ 1242. Nondiscrimination provision.

"(a) In general.

No person in the United States shall on the ground of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under subchapter I of this chapter.

"(b) Authority of Secretary.

Whenever the Secretary determines that a State government or unit of local government has failed to comply with subsection (a) of this section or an applicable regulation, he shall notify the Governor of the State (or, in the case of a unit of local government, the Governor of the State in which such unit is located) of the noncompliance and shall request the Governor to secure compliance. If within a reasonable period of time the Governor fails or refuses to secure compliance, the Secretary is authorized (1) to refer the matter to the Attorney General with a recommendation that an appropriate civil action be instituted; (2) to exercise the powers and functions provided by title VI of the Civil Rights Act of 1964; or (3) to take such other actions as may be provided by law.

"(c) Authority of Attorney General.

When a matter is referred to the Attorney General pursuant to subsection (b) of this section, or whenever he has reason to believe that a State government or unit of local government is engaged in a pattern or practice in violation of the provisions of this section, the Attorney General may bring a civil action in any appropriate United States district court for such relief as may be appropriate, including injunctive relief."

Crime Control Act of 1973, P.L. 93-83

(Title I, Part F of this law, which amends the Omnibus Crime Control and Safe Streets Act of 1968 to establish the Law Enforcement Assistance Administration, specifically deals with employment discrimination.)

TITLE I—LAW ENFORCEMENT ASSISTANCE

PART F—ADMINISTRATIVE PROVISIONS

* * *

"SEC. 518. (a) Nothing contained in this title or any other Act shall be construed to authorize any department, agency, officer or employee of the United States to exercise any direction, supervision, or control over any police force or any other law enforcement and criminal justice agency of any State or any political subdivision thereof.

"(b) Notwithstanding any other provision of law nothing contained in this title shall be construed to authorize the Administration (1) to require, or condition the availability or amount of a grant upon, the adoption by an applicant or grantee under this title of a percentage ratio, quota system, or other program to achieve racial balance or to eliminate racial imbalance in any law enforcement agency, or (2) to deny or discontinue a grant because of the refusal of an applicant or grantee under this title to adopt such a ratio, system, or other program.

"(c) (1) No person in any State shall on the ground of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under this title.

"(2) Whenever the Administration determines that a State government or any unit of general local government has failed to comply with subsection (c)(1) or an applicable regulation, it shall notify the chief executive of the State of the noncompliance and shall request the chief executive to secure compliance. If within a reasonable time after such notification the chief executive fails or refuses to secure compliance, the Administration shall exercise the powers and functions provided in section 509 of this title, and is authorized concurrently with such exercise—

"(A) to institute an appropriate civil action:

"(B) to exercise the powers and functions pursuant to title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d); or

"(C) to take such other action as may be provided by law.

"(3) Whenever the Attorney General has reason to believe that a State government or unit of local government is engaged in a pattern or practice in violation of the provisions of this section, the Attorney General may bring a civil action in any appropriate United States district court for such relief as may be appropriate, including injunctive relief."

The Rehabilitation Act of 1973, as Amended
P.L. 93-112 as Amended by P.L. 93-516

(The following provisions of this Act specifically deal with nondiscrimination in employment. The sentence in italics was added by the amendment.)

SECTION 7. For the purposes of the Act:

* * *

"(6) The term 'handicapped individual' means any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to titles I and III of this Act. *For the purposes of titles IV and V of this Act, such term means any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.*

TITLE V—MISCELLANEOUS

EMPLOYMENT OF HANDICAPPED INDIVIDUALS

"SEC. 501. (a) There is established within the Federal Government an Interagency Committee on Handicapped Employees (hereinafter in this section referred to as the 'Committee'), comprised of such members as the President may select, including the following (or their designees whose positions are Executive Level IV or higher): the Chairman of the Civil Service Commission, the Administrator of Veterans' Affairs, and the Secretaries of Labor and Health, Education, and Welfare. The Secretary of Health, Education, and Welfare and the Chairman of the Civil Service Commission shall serve as co-chairmen of the Committee. The resources of the President's Committees on Employment of the Handicapped and on Mental Retardation shall be made fully available to the Committee. It shall be the purpose and function of the Committee (1) to provide a focus for Federal and other employment of handicapped individuals, and to review, on a periodic basis, in cooperation with the Civil Service Commission, the adequacy of hiring, placement, and advancement practices with respect to handicapped individuals, by each department, agency, and instrumentality in the executive branch of Government, and to insure that the special needs of such individuals are being met; and (2) to consult with the Civil Service Commission to assist the Commission to carry out its responsibilities under subsections (b), (c), and (d) of this section. On the basis of such review and consultation, the Committee shall periodically make to the Civil Service Commission such recommendations for legislative and administrative changes as it deems necessary or desirable. The Civil Service Commission shall timely transmit to the appropriate committees of Congress any such recommendations.

"(b) Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after the date of enactment of this Act, submit to the Civil Service Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for handicapped individuals."

* * *

EMPLOYMENT UNDER FEDERAL CONTRACTS

"SEC. 503. (a) Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 7(6). The provisions of this section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. The President shall implement the provisions of this section by promulgating regulations within ninety days after the date of enactment of this section.

"(b) If any handicapped individual believes any contractor has failed or refused to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

"(c) The requirements of this section may be waived, in whole or in part, by the President with respect to a particular contract or subcontract, in accordance with guidelines set forth in regulations which he shall prescribe, when he determines that special circumstances in the national interest so require and states in writing his reasons for such determination.

NONDISCRIMINATION UNDER FEDERAL GRANTS

"SEC. 504. No otherwise qualified handicapped individual in the United States, as defined in section 7(6), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

The Comprehensive Employment and Training Act of 1973, P.L. 93-203

(The following provisions of this Act specifically relate to nondiscrimination in employment.)

TITLE 1—COMPREHENSIVE MANPOWER SERVICES

"SEC. 108.

"(b)(1) The Secretary shall not finally disapprove any comprehensive manpower plan submitted under this title, or any modifications thereof, without first affording the prime sponsor submitting the plan reasonable notice and opportunity for a hearing.

"(2) If the Secretary receives a formal allegation from an affected unit of general local government that a prime sponsor has changed its comprehensive manpower plan so that it no longer complies with section 105 or that in the administration of the plan there is a failure to comply substantially with any such provision, with any provision of the plan, or with any requirements of section 603 or 604, he shall, and, if he receives such an allegation from any other interested person, he may, or, if such allegation is supported by substantial evidence, he shall, after due notice and opportunity for a hearing to the prime sponsor, determine whether the allegation is true. If he determines such an allegation to be true, the Secretary shall notify the prime sponsor that no further payments will be made to the prime sponsor under the plan (or, in his discretion, that further payments will be limited to programs under or portions of the plan not affected by such failure), until he is satisfied that there will no longer be any failure to comply. Until he is so satisfied, the Secretary shall make no further payments to such sponsor under the plan (or shall limit payments to programs under the plan not affected by the failure).

"(c) The Secretary shall not disapprove any plan solely because of the percentage of funds devoted to a particular program or activity authorized under section 101 of this Act.

"(d) Whenever the Secretary determines, after notice and opportunity for a public hearing, that any prime sponsor designated to serve under this Act is—

"(1) maintaining a pattern or practice of discrimination in violation of section 603(1) or section 612(a) of this Act or otherwise failing to serve equitably the economically disadvantaged, unemployed, or underemployed persons in the area it serves;"

* * *

"[T]he Secretary shall revoke the prime sponsor's plan for the area, in whole or in part, and to the extent necessary and appropriate shall not make any further payments to such prime sponsor under this Act, and he shall notify such sponsor to return to him all or part of the unexpended sums paid under this Act during that fiscal year.

TITLE II—PUBLIC EMPLOYMENT PROGRAMS

"SEC. 208.

"(f) The Secretary shall not provide financial assistance for any program under this title unless the grant, contract, or agreement with respect thereto specifically provides that no persons with responsibilities in the operation of such program will discriminate with respect to any program participant or any applicant for participation in such program because of race, creed, color, national origin, sex, political affiliation, or beliefs.

"(g) The Secretary shall not provide financial assistance for any program under this title which involves political activities; and neither the program, the funds provided therefor, nor personnel employed in the administration thereof, shall be, in any way or to any extent, engaged in the conduct of political activities in contravention of chapter 15 of title 5, United States Code.

TITLE VI—GENERAL PROVISIONS CONDITIONS APPLICABLE TO ALL PROGRAMS

"SEC. 603. The Secretary shall not provide financial assistance for any program under this Act unless—

(1) the grant, contract, or agreement with respect thereto specifically provides that no person with responsibilities in the operation of such program will discriminate with respect to any program participant or any applicant for participation in such program because of race, creed, color, national origin, sex, political affiliation, or beliefs; . . ."

* * *

NONDISCRIMINATION

"SEC. 612. (a) No person in the United States shall on the ground of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under this Act.

"(b) Whenever the Secretary determines that a prime sponsor or eligible applicant has failed to comply with

subsection (a) or an applicable regulation, he shall notify the prime sponsor or eligible applicant of the noncompliance and shall request the prime sponsor or eligible applicant to secure compliance. If within a reasonable period of time, not to exceed sixty days, the prime sponsor or eligible applicant fails or refuses to secure compliance, the Secretary, in addition to exercising the powers and functions provided for the termination of financial assistance under this Act, is authorized (1) to refer the matter to the Attorney General with a recommendation that an appropriate civil action be instituted; (2) to exercise the powers and functions provided by title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d); or (3) to take such other action as may be provided by law.

"(c) When a matter is referred to the Attorney General pursuant to subsection (b), or whenever he has reason to believe that a prime sponsor or eligible applicant is engaged in a pattern or practice in violation of the provisions of this section, the Attorney General may bring a civil action in any appropriate United States district court for such relief as may be appropriate, including injunctive relief.

"(d) The Secretary shall enforce the provisions of subsection (a) dealing with discrimination on the basis of sex in accordance with section 602 of the Civil Rights Act of 1964. Section 603 of such Act shall apply with respect to any action taken by the Secretary to enforce such provisions of such subsection. This section shall not be construed as affecting any other legal remedy that a person may have if that person is excluded from participation in, denied the benefits of, subjected to discrimination under, or denied employment in connection with any program or activity receiving assistance under this Act."

Vietnam-Era Veterans' Readjustment Assistance Act of 1974, P.L. 93-508

(The Act amended Chapter 42 of Title 38 of the U.S. Code, dealing with the employment and training of disabled and Vietnam-era veterans. The following provisions, as amended, are relevant to the affirmative action obligations of federal contractors and Federal Government agencies.)

§ 2011. Definitions.

"As used in this chapter—

"(1) The term 'disabled veteran' means a person entitled to disability compensation under laws administered by the Veterans' Administration for a disability rated at 30 per centum or more, or a person whose discharge or release from active duty was for a disability incurred or aggravated in line of duty.

"(2) The term 'veteran of the Vietnam era' means a person (A) who (i) served on active duty for a period of more than 180 days, any part of which occurred during the Vietnam era, and was discharged or released therefrom with other than a dishonorable discharge, or (ii) was discharged or released from active duty for a service-connected disability if any part of such active duty was performed during the Vietnam era, and (B) who was so discharged or released within the 48 months preceding his application for employment covered under this chapter.

"(3) The term 'department and agency' means any department or agency of the Federal Government or any federally owned corporation."

§ 2012. Veterans' employment emphasis under Federal contracts.

"(a) Any contract in the amount of $10,000 or more entered into by any department or agency for the procurement of personal property and non-personal services (including construction) for the United States, shall contain a provision requiring that the party contracting with the United States shall take affirmative action to employ and advance in employment qualified disabled veterans and veterans of the Vietnam era. The provisions of this section shall apply to any subcontract entered into by a prime contractor in carrying out any contract for the procurement of personal property and non-personal services (including construction) for the United States. In addition to requiring affirmative action to employ such veterans under such contracts and subcontracts and in order to promote the implementation of such requirement, the President shall implement the provisions of this section by promulgating regulations within 60 days after the date of enactment of this section, which regulations shall require that (1) each such contractor undertake in such contracts to list immediately with the appropriate local employment service office all of its suitable employment openings, and (2) each such local office shall give such veterans priority in referral to such employment openings.

"(b) If any disabled veteran or veteran of the Vietnam era believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to the employment of veterans, such veteran may file a complaint with the Veterans' Employment Service of the Department of Labor. Such complaint shall be promptly referred to the Secretary who shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant consistent with the terms of such contract and the laws and regulations applicable thereto. . . ."

* * *

§ 2014. Employment within the Federal Government

"(a) It is the policy of the United States and the purpose of this section to promote the maximum of employment and job advancement opportunities within the Federal Government for qualified disabled veterans and veterans of the Vietnam era.

"(b) To further this policy, veterans of the Vietnam era shall be eligible, in accordance with regulations which the

Civil Service Commission shall prescribe, for veterans readjustment appointments up to and including the GS-5, as specified in subchapter II of chapter 51 of title 5, conditions specified in Executive Order Number 11521 (March 26, 1970), except that in applying the one-year period of eligibility specified in section 2(a) of such order to a veteran or disabled veteran who enrolls, within one year following separation from the Armed Forces or following release from hospitalization or treatment immediately following separation from the Armed Forces, in a program of education (as defined in section 1652 of this title) on more than a half-time basis (as defined in section 1788 of this title), the time spent in such program of education (including customary periods of vacation and permissible absences) shall not be counted. The eligibility of such a veteran for a readjustment appointment shall continue for not less than six months after such veteran first ceases to be enrolled therein on more than a halftime basis. No veterans' readjustment appointment may be made under authority of this subsection after June 30, 1978.

"(c) Each department, agency, and instrumentality in the executive branch shall include in its affirmative action plan for the hiring, placement, and advancement of handicapped individuals in such department, agency, or instrumentality as required by section 501(b) of Public Law 93-112 (87 Stat. 391), a separate specification of plans (in accordance with regulations which the Civil Service Commission shall prescribe in consultation with the Administrator, the Secretary of Labor, and the Secretary of Health, Education, and Welfare, consistent with the purposes, provisions, and priorities of such Act) to promote and carry out such affirmative action with respect to disabled veterans in order to achieve the purpose of this section.

"(d) The Civil Service Commission shall be responsible for the review and evaluation of the implementation of this section and the activities of each such department, agency, and instrumentality to carry out the purpose and provisions of this section. The Commission shall periodically obtain and publish (on at least a semiannual basis) reports on such implementation and activities from each such department, agency, and instrumentality, including specification of the use and extent of appointments made under subsection (b) of this section and the results of the plans required under subsection (c) thereof.

"(e) The Civil Service Commission shall submit to the Congress annually a report on activities carried out under this section, except that, with respect to subsection (c) of this section, the Commission may include a report of such activities separately in the report required to be submitted by section 501(d) of such Public Law 93-112, regarding the employment of handicapped individuals by each department, agency, and instrumentality.

"(f) Notwithstanding section 2011 of this title, the terms 'veteran' and 'disabled veteran' as used in this section shall have the meaning provided for under generally applicable civil service law and regulations."

Executive Order 11478

Text of Executive Order 11478, signed by President Nixon August 8, 1969, prohibiting discrimination in federal employment on account of race, color, religion, sex, or national origin. These provisions supersede Part I of Executive Order 11246, as amended by Executive Order 11375.

EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT

It has long been the policy of the United States Government to provide equal opportunity in Federal employment on the basis of merit and fitness and without discrimination because of race, color, religion, sex, or national origin. All recent Presidents have fully supported this policy, and have directed department and agency heads to adopt measures to make it a reality.

As a result, much has been accomplished through positive agency programs to assure equality of opportunity. Additional steps, however, are called for in order to strengthen and assure fully equal employment opportunity in the Federal Government.

NOW, THEREFORE, under and by virtue of the authority vested in me as President of United States by the Constitution and statutes of the United States, it is ordered as follows:

Section 1. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency. This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government.

Section 2. The head of each executive department and agency shall establish and maintain an affirmative program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in section 1. It is the responsibility of each department and agency head, to the maximum extent possible, to provide sufficient resources to administer such a program in a positive and effective manner; assure that recruitment activities reach all sources of job candidates; utilize to the fullest extent the present skills of each employee; provide the maximum feasible opportunity to employees to enhance their skills so they may perform at their highest potential and advance in accordance with their abilities; provide training and advice to managers and supervisors to assure their understanding and implementation of the policy expressed in this Order; assure participation at the local level with

other employers, schools, and public or private groups in cooperative efforts to improve community conditions which affect employability; and provide for a system within the department or agency for periodically evaluating the effectiveness with which the policy of this Order is being carried out.

Section 3. The Civil Service Commission shall provide leadership and guidance to departments and agencies in the conduct of equal employment opportunity programs for the civilian employees of and applicants for employment within the executive departments and agencies in order to assure that personnel operations in Government departments and agencies carry out the objective of equal opportunity for all persons. The Commission shall review and evaluate agency program operations periodically, obtain such reports from departments and agencies as it deems necessary, and report to the President as appropriate on overall progress. The Commission will consult from time to time with such individuals, groups, or organizations as may be of assistance in improving the Federal program and realizing the objectives of this Order.

Section 4. The Civil Service Commission shall provide for the prompt, fair, and impartial consideration of all complaints of discrimination in Federal employment on the basis of race, color, religion, sex, or national origin. Agency systems shall provide access to counseling for employees who feel aggrieved and shall encourage the resolution of employee problems on an informal basis. Procedures for the consideration of complaints shall include at least one impartial review within the executive department or agency and shall provide for appeal to the Civil Service Commission.

Section 5. The Civil Service Commission shall issue such regulations, orders, and instructions as it deems necessary and appropriate to carry out this Order and assure that the executive branch of the Government leads the way as an equal opportunity employer, and the head of each executive department and agency shall comply with the regulations, orders, and instructions issued by the Commission under this Order.

Section 6. This Order applies (a) to military departments as defined in section 102 of title 5, United States Code, and executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code, and to the employees thereof (including employees paid from nonappropriated funds), and (b) to those portions of the legislative and judicial branches of the Federal Government and of the Government of the District of Columbia having positions in the competitive service and to the employees in those positions. This Order does not apply to aliens employed outside the limits of the United States.

Section 7. Part I of Executive Order No. 11246 of September 24, 1965, and those parts of Executive Order No. 11375 of October 13, 1967, which apply to Federal employment, are hereby superseded.

OFCC Affirmative Action Guidelines

Following is the full text of Revised Order No. 4, Affirmative Action Guidelines, issued by the Office of Federal Contract Compliance, September 30, 1972, and covering federal contractors and subcontractors. It reads as last amended, effective July 12, 1974.

Chapter 60—Office of Federal Contract Compliance, Equal Employment Opportunity, Department of Labor

PART 60-2—AFFIRMATIVE ACTION PROGRAMS

Pursuant to Executive Order 11246, sections 201, 205, 211 (30 F.R., 12319), and 41 CFR 60—1.6, 60—1.28, 60—1.29, 60—1.40, Title 41 of the Code of Federal Regulations is hereby amended by adding a new Part 60—2 to read as set forth below.

Subpart A—General

Sec.

60—2.1 Title, purpose and scope.
60—2.2 Agency action.

Subpart B—Required Contents of Affirmative Action Programs

60—2.10 Purpose of affirmative action program.
60—2.11 Required utilization analysis.
60—2.12 Establishment of goals and timetables.
60—2.13 Additional required ingredients of affirmative action programs.
60—2.14 Compliance status.

Subpart C—Methods of Implementing the Requirements of Subpart B

60—2.20 Development or reaffirmation of the equal employment opportunity policy.
60—2.21 Dissemination of the policy.
60—2.22 Responsibility for implementation.
60—2.23 Identification of problem areas by organization unit and job classification.
60—2.24 Development and execution of programs.
60—2.25 Internal audit and reporting systems.
60—2.26 Support of action programs.

Subpart D—Miscellaneous

60—2.30 Use of goals.
60—2.31 Preemption.
60—2.32 Supersedure.

AUTHORITY: The provisions of this Part 60—2 issued pursuant to sec. 201, Executive Order 11246 (30 F.R. 12319).

Subpart A—General

§ 60-2.1 Title, purpose and scope.

This part shall also be known as "Revised Order No. 4," and shall cover non-construction contractors. Section 60-

1.40 of this Chapter, Affirmative Action Compliance Programs, requires that within 120 days from the commencement of a contract each prime contractor or subcontractor with 50 or more employees and a contract of $50,000 or more develop a written affirmative action compliance program for each of its establishments, and such contractors are now further required to revise existing written affirmative action programs to include the changes embodied in this order within 120 days of its publication in the FEDERAL REGISTER. A review of agency compliance surveys indicates that many contractors do not have affirmative action programs on file at the time an establishment is visited by a compliance investigator. This part details the agency review procedure and the results of a contractor's failure to develop and maintain an affirmative action program and then set forth detailed guidelines to be used by contractors and Government agencies in developing and judging these programs as well as the good faith effort required to transform the programs from paper commitments to equal employment opportunity. Subparts B and C are concerned with affirmative action plans only.

Relief for members of an "affected class" who, by virtue of past discrimination, continue to suffer the present effects of that discrimination shall be provided in the conciliation agreement entered into pursuant to § 60-60.6 of this title. An "affected class" problem must be remedied in order for a contractor to be considered in compliance. Section 60-2.2 herein pertaining to an acceptable affirmative action program is also applicable to the failure to remedy discrimination against members of an "affected class."

§ 60-2.2 Agency action.

(a) Any contractor required by § 60-1.40 of this chapter to develop an affirmative action program at each of his establishments who has not complied fully with that section is not in compliance with Executive Order 11246, as amended (30 F.R. 12319). Until such programs are developed and found to be acceptable in accordance with the standards and guidelines set forth in §§ 60-2.10 through 60-2.32, the contractor is unable to comply with the equal employment opportunity clause. An affirmative plan shall be deemed to have been accepted by the government at the time (the) appropriate compliance agency has accepted such plan unless within 45 days thereafter the Office of Federal Contract Compliance has disapproved such plan.

(2) The appropriate compliance agency shall notify the contractor and the Office of Federal Contract Compliance when it has accepted an affirmative action plan.

(b) If, in determining such contractor's responsibility for an award of a contract it comes to the contracting officer's attention, through sources within his agency or through the Office of Federal Contract Compliance or other Government agencies, that the contractor has not developed an acceptable affirmative action program at each of his establishments, or has substantially deviated from such an approved affirmative action plan, the contracting officer shall notify the Director and declare the contractor-bidder nonresponsible unless he can otherwise affirmatively determine that the contractor is able to comply with his equal employment obligations or, unless, upon review, it is determined by the Director that substantial issues of law or fact exist as to the contractor's responsibility to the extent that a hearing is, in his sole judgment, required prior to a determination that the contractor is nonresponsible: *Provided*, That during any pre-award conferences every effort shall be made through the processes of conciliation, mediation and persuasion to develop an acceptable affirmative action program meeting the standards and guidelines set forth in §§ 60-2.10 through 60-2.32 so that, in the performance of his contract, the contractor is able to meet his equal employment obligations in accordance with the equal opportunity clause and applicable rules, regulations, and orders: *Provided further*, That when the contractor-bidder is declared nonresponsible more than once for inability to comply with the equal employment opportunity clause a notice setting a timely hearing date shall be issued concurrently with the second nonresponsibility determination in accordance with the provisions of § 60-1.26 proposing to declare such contractor-bidder ineligible for future contracts and subcontracts.

(c) Immediately upon finding that a contractor has no affirmative action program or has substantially deviated from such an approved affirmative action plan that his program is not acceptable to the contracting officer, the compliance agency representative or the representative of the Office of Federal Contract Compliance, whichever has made such a finding, shall notify officials of the appropriate compliance agency and the Office of Federal Contract Compliance of such fact. The compliance agency shall issue a notice to the contractor giving him 30 days to show cause why enforcement proceedings under section 209(b) of Executive Order 11246, as amended, should not be instituted.

(1) If the contractor fails to show good cause for his failure or fails to remedy that failure by developing and implementing an acceptable affirmative action program within 30 days, the compliance agency, upon the approval of the Director, shall immediately issue a notice of proposed cancellation or termination of existing contracts or subcontracts and debarment from future contracts and subcontracts pursuant to § 60-1.26(b), giving the contractor 14 days to request a hearing. If a request for hearing has not been received within 14 days from such notice, such contractor will be declared ineligible for future contracts and current contracts will be terminated for default.

(2) During the "show cause" period of 30 days every effort shall be made by the compliance agency through conciliation, mediation, and persuasion to resolve the deficiencies which led to the determination of nonresponsibility. If satisfactory adjustments designed to bring the contractor into compliance are not concluded, the compliance agency, with the prior approval of the Director,

shall promptly commence formal proceedings leading to the cancellation or termination of existing contracts or subcontracts and debarment from future contracts and subcontracts under § 60-1.26(b) of this chapter.

(d) During the "show cause" period and formal proceedings, each contracting agency must continue to determine the contractor's responsibility in considering whether or not to award a new or additional contract. (As last amended, and effective Jan. 31, 1973.)

Subpart B—Required Contents of Affirmative Action Programs

§ 60-2.10 Purpose of affirmative action program.

An affirmative action program is a set of specific and result-oriented procedures to which a contractor commits himself to apply every good faith effort. The objective of those procedures plus such efforts is equal employment opportunity. Procedures without effort to make them work are meaningless; and effort, undirected by specific and meaningful procedures, is inadequate. An acceptable affirmative action program must include an analysis of areas within which the contractor is deficient in the utilization of minority groups and women, and further, goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies and, thus to achieve prompt and full utilization of minorities and women, at all levels and in all segments of his work force where deficiencies exist.

§ 60-2.11 Required utilization analysis.

Based upon the Government's experience with compliance reviews under the Executive order programs and the contractor reporting system, minority groups are most likely to be underutilized in departments and jobs within departments that fall within the following Employer's Information Report (EEO-1) designations: officials and managers, professionals, technicians, sales workers, office and clerical and craftsmen (skilled). As categorized by the EEO-1 designations, women are likely to be underutilized in departments and jobs within departments as follows: officials and managers, professionals, technicians, sales workers (except over-the-counter sales in certain retail establishments), craftsmen (skilled and semi-skilled). Therefore, the contractor shall direct special attention to such jobs in his analysis and goal setting for minorities and women. Affirmative action programs must contain the following information:

(a) Workforce analysis which is defined as a listing of each job title as appears in applicable collective bargaining agreements or payroll records (not job group) ranked from the lowest paid to the highest paid within each department or other similar organizational unit including departmental or unit supervision. If there are separate work units or lines of progression within a department a separate list must be provided for each such work unit, or line, including unit supervisors. For lines of progression there must be indicated the order of jobs in the line through which an employee could move to the top of the line. Where there are no formal progression lines or usual promotional sequences, job titles should be listed by department, job families, or disciplines, in order of wage rates or salary ranges. For each job title the total number of male and female incumbents, and the total number of male and female incumbents in each of the following groups must be given: Blacks, Spanish-surnamed Americans, American Indians, and Orientals. The wage rate or salary range for each job title should be given. All jobs, including all managerial job classifications, must be listed.

(b) An analysis of all major job groups at the facility, with explanation if minorities or women are currently being underutilized in any one or more job groups (job "groups" herein meaning one or a group of jobs having similar content, wage rates and opportunities). "Underutilization" is defined as having fewer minorities or women in a particular job group than would reasonably be expected by their availability. In making the utilization analysis, the contractor shall conduct such analysis separately for minorities and women.

(1) In determining whether minorities are being underutilized in any job group the contractor will consider at least all of the following factors:

(i) The minority population of the labor area surrounding the facility;

(ii) The size of the minority unemployment force in the labor area surrrounding the facility;

(iii) The percentage of the minority work force as compared with the total work force in the immediate labor area;

(iv) The general availability of minorities having requisite skills in the immediate labor area;

(v) The availability of minorities having requisite skills in an area in which the contractor can reasonably recruit;

(vi) The availability of promotable and transferable minorities within the contractor's organization;

(vii) The existence of training institutions capable of training persons in the requisite skills; and

(viii) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to minorities.

(2) In determining whether women are being underutilized in any job group the contractor will consider at least all of the following factors:

(i) The size of the female unemployment force in the labor area surrounding the facility;

(ii) The percentage of the female workforce as compared with the total workforce in the immediate labor area;

(iii) The general availability of women having requisite skills in the immediate labor area;

(iv) The availability of women having requisite skills in an area in which the contractor can reasonably recruit;

(v) The availability of women seeking employment in the labor or recruitment area of the contractor;

(vi) The availability of promotable and transferable female employees within the contractor's organization;

(vii) The existence of training institutions capable of training persons in the requisite skills; and

(viii) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to women.

§ 60-2.12 Establishment of goals and timetables.

(a) The goals and timetables developed by the contractor should be attainable in terms of the contractor's analysis of his deficiencies and his entire affirmative action program. Thus, in establishing the size of his goals and the length of his timetables, the contractor should consider the results which could reasonably be expected from his putting forth every good faith effort to make his overall affirmative action program work. In determining levels of goals, the contractor should consider at least the factors listed in § 60-2.11.

(b) Involve personnel relations staff, department and division heads, and local and unit managers in the goal setting process.

(c) Goals should be significant, measurable and attainable.

(d) Goals should be specific for planned results, with timetables for completion.

(e) Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work.

(f) In establishing timetables to meet goals and commitments, the contractor will consider the anticipated expansion, contraction and turnover of and in the work force.

(g) Goals, timetables and affirmative action commitments must be designed to correct any identifiable deficiencies.

(h) Where deficiencies exist and where numbers or percentages are relevant in developing corrective action, the contractor shall establish and set forth specific goals and timetables separately for minorities and women.

(i) Such goals and timetables, with supporting data and the analysis thereof shall be a part of the contractor's written affirmative action program and shall be maintained at each establishment of the contractor.

(j) Where the contractor has not established a goal, his written affirmative action program must specifically analyze each of the factors listed in 60-2.11 and must detail his reason for a lack of a goal.

(k) In the event it comes to the attention of the compliance agency or the Office of Federal Contract Compliance that there is a substantial disparity in the utilization of a particular minority group or men or women of a particular minority group, the compliance agency or OFCC may require separate goals and timetables for such minority group and may further require, where appropriate, such goals and timetables by sex for such group for such job classifications and organizational units specified by the compliance agency or OFCC.

(l) Support data for the required analysis and program shall be compiled and maintained as part of the contractor's affirmative action program. This data will include but not be limited to progression line charts, seniority rosters, applicant flow data, and applicant rejection ratios indicating minority and sex status.

(m) Copies of affirmative action programs and/or copies of support data shall be made available to the compliance agency or the Office of Federal Contract Compliance, at the request of either, for such purposes as may be appropriate to the fulfillment of their responsibilities under Executive Order 11246, as amended.

§ 60-2.13 Additional required ingredients of affirmative action programs.

Effective affirmative action programs shall contain, but necessarily be limited to, the following ingredients:

(a) Development or reaffirmation of the contractor's equal employment opportunity policy in all personnel actions.

(b) Formal internal and external dissemination of the contractor's policy.

(c) Establishment of responsibilities for implementation of the contractor's affirmative action program.

(d) Identification of problem areas (deficiencies) by organizational units and job group.

(e) Establishment of goals and objectives by organizational units and job groups, including timetables for completion.

(f) Development and execution of action oriented programs designed to eliminate problems and further designed to attain established goals and objectives.

(g) Design and implementation of internal audit and reporting systems to measure effectiveness of the total program.

(h) Compliance or personnel policies and practices with the Sex Discrimination Guidelines (41 CFR Part 60-20).

(i) Active support of local and national community action programs and community service programs, designed to improve the employment opportunities of minorities and women.

(j) Consideration of minorities and women not currently in the workforce having requisite skills who can be recruited through affirmative action measures.

§ 60-2.14 Compliance status.

No contractor's compliance status shall be judged alone by whether or not he reaches his goals and meets his timetables. Rather, each contractor's compliance posture shall be reviewed and determined by reviewing the contents of his program, the extent of his adherence to this program, and his good faith efforts to make his program work toward

the realization of the program's goals within the timetables set for completion. There follows an outline of examples of procedures that contractors and Federal agencies should use as a guideline for establishing, implementing, and judging an acceptable affirmative action program.

Subpart C—Methods of Implementing the Requirements of Subpart B

§ 60-2.20 Development or reaffirmation of the equal employment opportunity policy.

(a) The contractor's policy statement should indicate the chief executive officer's attitude on the subject matter, assign overall responsibility and provide for a reporting and monitoring procedure. Specific items to be mentioned should include, but not limited to:

(1) Recruit, hire, train, and promote persons in all job groups, without regard to race, color, religion, sex, or national origin, except where sex is a bona fide occupational qualification. (The term "bona fide occupational qualification" has been construed very narrowly under the Civil Rights Act of 1964. Under Executive Order 11246 as amended and this part, this term will be construed in the same manner.)

(2) Base decisions on employment so as to further the principle of equal employment opportunity.

(3) Insure that promotion decisions are in accord with principles of equal employment opportunity by imposing only valid requirements for promotional opportunities.

(4) Insure that all personnel actions such as compensation, benefits, transfers, layoffs, return from layoff, company sponsored training, education, tuition assistance, social and recreation programs, will be administered without regard to race, color, religion, sex, or national origin.

§ 60-2.21 Dissemination of the policy.

(a) The contractor should disseminate his policy internally as follows:

(1) Include it in contractor's policy manual.

(2) Publicize it in company newspaper, magazine, annual report and other media.

(3) Conduct special meetings with executive, management, and supervisory personnel to explain intent of policy and individual responsibility for effective implementation, making clear the chief executive officer's attitude.

(4) Schedule special meetings with all other employees to discuss policy and explain individual employee responsibilities.

(5) Discuss the policy thoroughly in both employee orientation and management training programs.

(6) Meet with union officials to inform them of policy, and request their cooperation.

(7) Include nondiscrimination clauses in all union agreements, and review all contractual provisions to ensure they are nondiscriminatory.

(8) Publish articles covering EEO programs, progress reports, promotions, etc., of minority and female employees, in company publications.

(9) Post the policy on company bulletin boards.

(10) When employees are featured in product or consumer advertising, employee handbooks or similar publications both minority and nonminority, men and women should be pictured.

(11) Communicate to employees the existence of the contractor's affirmative action program and make available such elements of his program as will enable such employees to know of and avail themselves of its benefits.

(b) The contractor should disseminate his policy externally as follows:

(1) Inform all recruiting sources verbally and in writing of company policy, stipulating that these sources actively recruit and refer minorities and women for all positions listed.

(2) Incorporate the Equal Opportunity clause in all purchase orders, leases, contracts, etc., covered by Executive Order 11246, as amended and its implementing regulations.

(3) Notify minority and women's organizations, community agencies, community leaders, secondary schools and colleges, of company policy, preferably in writing.

(4) Communicate to prospective employees the existence of the contractor's affirmative action program and make available such elements of his program as will enable such prospective employees to know of and avail themselves of its benefits.

(5) When employees are pictured in consumer or help wanted advertising, both minorities and nonminority men and women should be shown.

(6) Send written notification of company policy to all subcontractors, vendors and suppliers requesting appropriate action on their part.

§ 60-2.22 Responsibility for implementation.

(a) An executive of the contractor should be appointed as director or manager of company Equal Opportunity Programs. Depending upon the size and geographical alignment of the company, this may be his or her sole responsibility. He or she should be given the necessary top management support and staffing to execute the assignment. His or her identity should appear on all internal and external communications on the company's Equal Opportunity Programs. His or her responsibilities should include, but not necessarily be limited to:

(1) Developing policy statements, affirmative action programs, internal and external communication techniques.

(2) Assisting in the identification of problem areas.

(3) Assisting line management in arriving at solutions to problems.

(4) Designing and implementing audit and reporting systems that will:

(i) Measure effectiveness of the contractor's programs.

(ii) Indicate need for remedial action.

(iii) Determine the degree to which the contractor's goals and objectives have been attained.

(5) Serve as liaison between the contractor and enforcement agencies.

(6) Serve as liaison between the contractor and minority organizations, women's organizations and community action groups concerned with employment opportunities of minorities and women.

(7) Keep management informed of latest developments in the entire equal opportunity area.

(b) Line responsibilities should include, but not be limited to, the following:

(1) Assistance in the identification of problem areas and establishment of local and unit goals and objectives.

(2) Active involvement with local minority organizations, women's organizations, community action groups and community service programs.

(3) Periodic audit of training programs, hiring and promotion patterns to remove impediments to the attainment of goals and objectives.

(4) Regular discussions with local managers, supervisors and employees to be certain the contractor's policies are being followed.

(5) Review of the qualifications of all employees to insure that minorities and women are given full opportunities for transfers and promotions.

(6) Career counseling for all employees.

(7) Periodic audit to insure that each location is in compliance in areas such as:

(i) Posters are properly displayed.

(ii) All facilities, including company housing, which the contractor maintains for the use and benefit of his employees, are in fact desegregated, both in policy and use. If the contractor provides facilities such as dormitories, locker rooms and rest rooms, they must be comparable for both sexes.

(iii) Minority and female employees are afforded a full opportunity and are encouraged to participate in all company sponsored educational, training, recreational and social activities.

(8) Supervisors should be made to understand that their work performance is being evaluated on the basis of their equal employment opportunity efforts and results, as well as other criteria.

(9) It shall be a responsibility of supervisors to take actions to prevent harassment of employees placed through affirmative action efforts.

§ 60-2.23 Identification of problem areas by organizational units and job groups.

(a) An in-depth analysis of the following should be made, paying particular attention to trainees and those categories listed in § 60-2.11(d).

(1) Composition of the work force by minority group status and sex.

(2) Composition of applicant flow by minority group status and sex.

(3) The total selection process including position descriptions, position titles, worker specifications, application forms, interview procedures, test administration, test validity, referral procedures, final selection process, and similar factors.

(4) Transfer and promotion practices.

(5) Facilities, company sponsored recreation and social events, and special programs such as educational assistance.

(6) Seniority practices and seniority provisions of union contracts.

(7) Apprenticeship programs.

(8) All company training programs, formal and informal.

(9) Work force attitude.

(10) Technical phases of compliance, such as poster and notification to labor unions, retention of applications, notification to subcontractors, etc.

(b) If any of the following items are found in the analysis, special corrective action should be appropriate.

(1) An "underutilization" of minorities or women in specific job groups.

(2) Lateral and/or vertical movement of minority or female employees occurring at a lesser rate (compared to work force mix) than that of nonminority or male employees.

(3) The selection process eliminates a significantly higher percentage of minorities or women than nonminorities or men.

(4) Application and related preemployment forms not in compliance with Federal legislation.

(5) Position descriptions inaccurate in relation to actual functions and duties.

(6) Tests and other selection techniques not validated as required by the OFCC Order on Employee Testing and other Selection Procedures.

(7) Test forms not validated by location, work performance and inclusion of minorities and women in sample.

(8) Referral ratio of minorities or women to the hiring supervisor or manager indicates a significantly higher percentage are being rejected as compared to nonminority and male applicants.

(9) Minorities or women are excluded from or are not participating in company sponsored activities or programs.

(10) De facto segregation still exists at some facilities.

(11) Seniority provisions contribute to overt or inadvertent discrimination, i.e., a disparity by minority group status or sex exists between length of service and types of job held.

(12) Nonsupport of company policy by managers, supervisors or employees.

(13) Minorities or women underutilized or significantly

underrepresented in training or career improvement programs.

(14) No formal techniques established for evaluating effectiveness of EEO programs.

(15) Lack of access to suitable housing inhibits recruitment efforts and employment of qualified minorities.

(16) Lack of suitable transportation (public or private) to the work place inhibits minority employment.

(17) Labor unions and subcontractors not notified of their responsibilities.

(18) Purchase orders do not contain EEO clause.

(19) Posters not on display.

§ 60-2.24 Development and execution of programs.

(a) The contractor should conduct detailed analyses of position descriptions to insure that they accurately reflect position functions, and are consistent for the same position from one location to another.

(b) The contractor should validate worker specifications by division, department, location or other organizational unit and by job title using job performance criteria. Special attention should be given to academic, experience and skill requirements to insure that the requirements in themselves do not constitute inadvertent discrimination. Specifications should be consistent for the same job title in all locations and should be free from bias as regards to race, color, religion, sex, or national origin, except where sex is a bona fide occupational qualification. Where requirements screen out a disproportionate number of minorities or women such requirements should be professionally validated to job performance.

(c) Approved position descriptions and worker specifications, when used by the contractor, should be made available to all members of management involved in the recruiting, screening, selection, and promotion process. Copies should be distributed to all recruiting sources.

(d) The contractor should evaluate the total selection process to insure freedom from bias and, thus, aid the attainment of goals and objectives.

(1) All personnel involved in the recruiting, screening, selection, promotion, disciplinary, and related processes should be carefully selected and trained to insure elimination of bias in all personnel actions.

(2) The contractor shall observe the requirements of the OFCC Order pertaining to the validation of employee tests and other selection procedures.

(3) Selection techniques other than tests may also be improperly used so as to have the effect of discriminating against minority groups and women. Such techniques include but are not restricted to, unscored interviews, unscored or casual application forms, arrest records, credit checks, considerations of marital status or dependency or minor children. Where there exist data suggesting that such unfair discrimination or exclusion of minorities or women exists, the contractor should analyze his unscored procedures and eliminate them if they are not objectively valid.

(e) Suggested techniques to improve recruitment and increase the flow of minority or female applicants follow:

(1) Certain organizations such as the Urban League, Job Corps, Equal Opportunity Programs, Inc., Concentrated Employment Programs, Neighborhood Youth Corps, Secondary Schools, Colleges, and City Colleges with high minority enrollment, the State Employment Service, specialized employment agencies, Aspira, LULAC, SER, the G.I. Forum, the Commonwealth of Puerto Rico are normally prepared to refer minority applicants. Organizations prepared to refer women with specific skills are: National Organization for Women, Welfare Rights Organizations, Women's Equity Action League, Talent Bank from Business and Professional Women (including 26 women's organizations), Professional Women's Caucus, Intercollegiate Association of University Women, Negro Women's sororities and service groups such as Delta Sigma Theta, Alpha Kappa, and Zeta Phi Beta; National Council of Negro Women, American Association of University Women, YWCA, and sectarian groups such as Jewish Women's Groups, Catholic Women's Groups, and women's colleges. In addition, community leaders as individuals shall be added to recruiting sources.

(2) Formal briefing sessions should be held, preferably on company premises, with representatives from these recruiting sources. Plant tours, presentations by minority and female employees, clear and concise explanations of current and future job openings, position descriptions, worker specifications, explanations of the company's selection process, and recruiting literature should be an integral part of the briefing. Formal arrangements should be made for referral of applicants, followup with sources, and feedback on disposition of applicants.

(3) Minority and female employees, using procedures similar to subparagraph (2) of this paragraph, should be actively encouraged to refer applicants.

(4) A special effort should be made to include minorities and women on the Personnel Relations staff.

(5) Minority and female employees should be made available for participation in Career Days, Youth Motivation Programs, and related activities in their communities.

(6) Active participation in "Job Fairs" is desirable. Company representatives so participating should be given authority to make on-the-spot commitments.

(7) Active recruiting programs should be carried out at secondary schools, junior colleges, and colleges with predominant minority or female enrollments.

(8) Recruiting efforts at all schools should incorporate special efforts to reach minorities and women.

(9) Special employment programs should be undertaken whenever possible. Some possible programs are:

(i) Technical and nontechnical co-op programs with predominately Negro and women's colleges.

(ii) "After school" and/or work-study jobs for minority youths, male and female.

(iii) Summer jobs for underprivileged youth, male and female.

(iv) Summer work-study programs for male and female faculty members of the predominantly minority schools and colleges.

(v) Motivation, training and employment programs for the hard-core unemployed, male and female.

(10) When recruiting brochures pictorially present work situations, the minority and female members of the work force should be included, especially when such brochures are used in school and career programs.

(11) Help wanted advertising should be expanded to include the minority news media and women's interest media on a regular basis.

(f) The contractor should insure that minority and female employees are given equal opportunity for promotion. Suggestions for achieving this result include:

(1) Post or otherwise announce promotional opportunities.

(2) Make an inventory of current minority and female employees to determine academic, skill and experience level of individual employees.

(3) Initiate necessary remedial, job training and work-study programs.

(4) Develop and implement formal employee evaluation programs.

(5) Make certain "worker specifications" have been validated on job performance related criteria. (Neither minority nor female employees should be required to possess higher qualifications than those of the lowest qualified incumbent.)

(6) When apparently qualified minority or female employees are passed over for upgrading, require supervisory personnel to submit written justification.

(7) Establish formal career counseling programs to include attitude development, education aid, job rotation, buddy system and similar programs.

(8) Review seniority practices and seniority clauses in union contracts to insure such practices or clauses are nondiscriminatory and do not have a discriminatory effect.

(g) Make certain facilities and company-sponsored social and recreation activities are desegregated. Actively encourage all employees to participate.

(h) Encourage child care, housing and transportation programs appropriately designed to improve the employment opportunities for minorities and women.

§ 60-2.25 Internal audit and reporting systems.

(a) The contractor should monitor records of referrals, placements, transfers, promotions and terminations at all levels to insure nondiscriminatory policy is carried out.

(b) The contractor should require formal reports from unit managers on a schedule basis as to degree to which corporate or unit goals are attained and timetables met.

(c) The contractor should review report results with all levels of management.

(d) The contractor should advise top management of program effectiveness and submit recommendations to improve unsatisfactory performance.

§ 60-2.26 Support of action programs.

(a) The contractor should appoint key members of management to serve on Merit Employment Councils, Community Relations Boards and similar organizations.

(b) The contractor should encourage minority and female employees to participate actively in National Alliance of Businessmen programs for youth motivation.

(c) The contractor should support Vocational Guidance Institutes, Vestibule Training Programs and similar activities.

(d) The contractor should assist secondary schools and colleges in programs designed to enable minority and female graduates of these institutions to compete in the open employment market on a more equitable basis.

(e) The contractor should publicize achievements of minority and female employees in local and minority news media.

(f) The contractor should support programs developed by such organizations as National Alliance of Businessmen, the Urban Coalition and other organizations concerned with employment opportunities for minorities or women.

Subpart D—Miscellaneous

§ 60-2.30 Use of goals.

The purpose of a contractor's establishment and use of goals is to insure that he meet his affirmative action obligation. It is not intended and should not be used to discriminate against any applicant or employee because of race, color, religion, sex, or national origin.

§ 60-2.31 Preemption.

To the extent that any State or local laws, regulations or ordinances, including those which grant special benefits to persons on account of sex, are in conflict with Executive Order 11246, as amended, or with the requirements of this part, we will regard them as preempted under the Executive order.

§ 60-2.32 Supersedure.

All orders, instructions, regulations, and memoranda of the Secretary of Labor, other officials of the Department of Labor and contracting agencies are hereby superseded to the extent that they are inconsistent herewith, including a previous "Order No. 4" from this Office dated January 30, 1970. Nothing in this part is intended to amend 41 CFR 60-3 published in the Federal Register on October 2, 1971 or Employee Testing and Other Selection Procedures or 41 CFR 60-20 on Sex Discrimination Guidelines.

Effective date. This part shall become effective on the date of its publication in the Federal Register (12-4-71).

Signed at Washington, D.C., this 1st day of December 1971.

J. D. HODGSON,
Secretary of Labor.
HORACE E. MENASCO,
Acting Assistant Secretary for Employment Standards.
JOHN L. WILKS,
Director, Office of Federal Contract Compliance.

Order Establishing Standardized Compliance Reviews

Order No. 14 originally was issued to the heads of all federal agencies on Jan. 14, 1972, and implemented on July 1, 1972. It was revised and re-issued on February 6, 1974, effective April 15, 1974.

The Order was issued in completed form, including clarifying amendments, July 12, 1974. Also added at this time was a "Standard Compliance Review Report," which explains the steps compliance officers are required to take in conducting a compliance review.

Subpart A—General

§ 60-60.1 Purpose and scope.

This part shall be known as "Revised Order No. 14" and is intended to establish standardized contractor evaluation procedures for compliance agencies, in their conduct of compliance reviews of contractors for supplies and services subject to the Equal Employment Opportunity Requirements of 41 CFR 60-1.40 and 41 CFR Part 60-2 (Revised Order No. 4) for the development of written affirmative action programs.

§ 60-60.2 Background.

(a) Each prime contractor or subcontractor with 50 or more employees and a contract of $50,000 or more is required to develop a written affirmative action program for each of its establishments (§60-1.40 of this chapter). If a contractor fails to submit an affirmative action program and supporting documents, including the workforce analysis within 30 days of a request therefor, the enforcement procedures specified in OFCC Order No. 4 (§ 60-2.2(c) of this chapter) shall be applicable.

(b) Required affirmative action programs must contain a utilization analysis and goals and timetables as required in § 60-2.11 and § 60-2.12 of this chapter.

Subpart B—Procedures for Contractor Evaluation

§ 60-60.3 Agency actions.

Basic steps—A contractor evaluation should proceed as follows: (1) a desk audit of the contractor's affirmative action program with special attention directed to the included workforce analysis, using the format set forth in the Standard Compliance Review Report, (2) an on-site review of those matters which still are not fully or satifactorily addressed in the affirmative action program and workforce analysis, using the format set forth in the Standard Compliance Review Report and (3) where necessary, an off-site analysis of information supplied by the contractor during or pursuant to the on-site review. (The standard compliance review report will be published on or before the effective date of this part.) Contractors may reach agreement with their respective compliance agencies on nationwide AAP formats or on frequency or updating statistics with the approval of the Director of OFCC.

(a) *Desk Audit*—Using OFCC approved methods of priority selection, compliance agencies shall routinely request from among the Federal contractors within their jurisdiction affirmative action programs and supporting documentation, including the workforce analysis and support data for audit. As used throughout this part, the term "Affirmative Action Program (AAP) and supporting documentation" means the Required Contents of Affirmative Action Programs, as set forth in Subpart B of 41 CFR Part 60-2 and Methods of Implementing the Requirements of Subpart B, set forth in Subpart C of 41 CFR Part 60-2. "Workforce analysis" is defined as a listing of each job title as appears in applicable collective bargaining agreements or payroll records (not job groups) ranked from the lowest paid to the highest paid within each department or other similar organizational unit including departmental or unit supervision. If there are separate work units or lines of progression within a department a separate list must be provided for each such work unit, or line, including unit supervisors. For lines of progression there must be indicated the order of jobs in the line through which an employee could move to the top of the line. Where there are no formal progression lines or usual promotional sequences, job titles should be listed by department, job families, or disciplines, in order of wage rates or salary ranges. For each job title, the total number of male and female incumbents, and the total number of male and female incumbents in each of the following groups must be given: Blacks, Spanish surnamed Americans, American Indians and Orientals. The wage rate or salary range for each job title should be given. All job titles, including managerial job titles, must be listed.

Exceptions to the desk audit requirements—For preaward reviews and for complaint investigations with the approval of the agency Contract Compliance Officer (as defined at § 60-1.6(b)), the desk audit need not be carried out or an abbreviated desk audit may be performed and an immediate on-site review performed. Special reports that meet the criteria in (b)(1) below may be requested from contractors, as required, for submission to the agency for complaint investigations and follow-up reviews performed within 1 year of a full compliance review. The

Director may approve other special compliance reviews when the circumstances require an immediate on-site review.

(b) *On-site review*—If upon selection of an AAP and included workforce analysis for desk audit, the compliance agency finds that the material submitted does not demonstrate a reasonable effort by the contractor to meet all the requirements of subparts B and C of Order No. 4, (Part 60-2 of this chapter) the on-site review need not be carried out and the enforcement procedures specified in Order 4 shall be applicable.

Otherwise following a desk audit of the affirmative action program and supporting documentation the agency will schedule an on-site review of the establishment, provided, that an on-site review need not be carried out when the agency can determine that the contractor's affirmative action program is acceptable. This determination must be based on the current desk audit and an on-site review conducted within the preceding 24 months and also must include an affirmative determination that the circumstances of the previous on-site review have not substantially changed.

(1) Each agency is to request from those contractors scheduled for on-site reviews that information necessary to perform the review be made available on-site. Specifically, this includes (1) information necessary to conduct an in depth analysis of apparent deficiencies in the contractor's utilization of women or minorities, (2) information required for a complete and thorough understanding of data contained in or offered as support for the affirmative action program and (3) information concerning matters relevant to a determination of compliance with the requirements of Executive Order 11246 (as amended), but not adequately addressed in the affirmative action program. However, the contractor should be requested to furnish only the specific items of information which the compliance officer determines are:

(i) Necessary for conducting the review and completing the standard compliance review report, and

(ii) Not contained in or able to be derived from the material submitted by the contractor.

(2) In order to pursue certain issues uncovered in the compliance review, it may be necessary for the compliance officer to request certain additional information on-site even though such data have not been previously identified. Such additional information must also meet the above criteria.

(c) *Off-site analysis*—Where necessary, the compliance officer may take information made available during the on-site review off-site for further analysis. An off-site analysis should be conducted where issues have arisen concerning deficiencies or an apparent violation which, in the judgment of the compliance officer, should be more thoroughly analyzed off-site before a determination of compliance is made.

Subpart C—Disclosure and Review of Contractor Data

§ 60-60.4 Confidentiality and relevancy of information.

(a) *Desk audit data*—If the contractor is concerned with the confidentiality of such information as lists of employees, employee names, reasons for termination and pay data, then alphabetic or numeric coding or the use of an index of pay and pay ranges are acceptable for desk audit purposes.

(b) *On-site data*—The contractor must provide full access to all relevant data on-site as required by § 60-1.43 of this chapter.

(c) *Data required for off-site analysis*—The contractor must provide all data determined by the compliance officer to be necessary for off-site analysis pursuant to §60-60.3 (c) above. Such data may only be coded if the contractor makes the code available to the compliance agency. If the contractor believes that particular information which is to be taken off-site is not relevant to compliance with the Executive Order, the contractor may request a ruling by the agency Contract Compliance Officer. The contract compliance officer shall issue a ruling within 10 days. The contractor may appeal that ruling to the Director of OFCC within 10 days. The Director of OFCC shall issue a final ruling within 10 days. Pending a final ruling, the information in question must be made available to the compliance officer off-site, but shall be considered a part of the investigatory file and subject to the provisions of paragraph (d) below. The agency shall take all necessary precautions to safeguard the confidentiality of such information until a final determination is made.

Such information may not be copied by the agency and access to the information shall be limited to the compliance officer and agency personnel involved in the determination of relevancy. Data determined to be not relevant to the investigation will be returned to the contractor immediately.

(d) *Public access to information*—Information obtained from a contractor under Subpart B will be subject to the public inspection and copying provisions of the Freedom of Information Act, 5 U.S.C. 552. Contractors should identify any information which they believe is not subject to disclosure under 5 U.S.C. 552, and should specify the reasons why such information is not disclosable. The Contract Compliance Officer will consider the contractor's claim and make a determination, within 10 days, as to whether the material in question is exempt from disclosure. The contract compliance officer will inform the contractor of such a determination. The contractor may appeal that ruling to the Director of OFCC within 10 days. The Director of OFCC shall make a final determination within 10 days of the filing of the appeal. However, during the conduct of a compliance review or while enforcement action against the contractor is in progress or contemplated within a reasonable time, all information obtained from a contractor under Subpart B except information disclosable under §§ 60-40.2 and 60-40.3 of this title

is to be considered part of an investigatory file compiled for law enforcement purposes within the meaning of 5 U.S.C. 552 (b) (7), and such information obtained from a contractor under Subpart B shall be treated as exempt from mandatory disclosure under the Freedom of Information Act during the compliance review.

(e) *Examination and copying of documents*—Nothing contained herein is intended to supersede or otherwise limit the provisions contained in Part 60-40 of this chapter for public access to information from records of the OFCC or its various compliance agencies.

§ 60-60.5 Employee interviews.

The compliance officer should contact, where appropriate, a reasonable number of employees for interviews as part of the on-site review of the contractor's employment practices. The number, scope and manner of conducting such interviews should be discussed in advance with the contractor.

§ 60-60.6 Exit conference.

(a) Upon completion of the on-site review (and off-site analysis, if one is undertaken) the compliance officer should schedule an exit conference with contractor officials to review the findings of the review. This exit conference should itemize the apparent violations that lend themselves to immediate correction, and solicit the contractor's agreement to take adequate corrective action by specified dates. The contractor's commitments should be contained in a written conciliation agreement signed at the exit conference. However, in cases where the apparent deficiencies require further analysis subsequent to the on-site review, the compliance officer will advise the contractor of the areas of concern, secure the data necessary to his ultimate compliance determination, complete the review later by notifying the contractor in writing of all apparent violations found, and obtain the contractor's commitments in a written conciliation agreement to correct such deficiencies.

(b) The contractor may at any time avail himself of the provisions of § 60-1.24(c)(4) of this chapter which provides as follows:

When a prime contractor or subcontractor, without a hearing, shall have complied with the recommendations or orders of an agency or the Director and believes such recommendations or orders to be erroneous, he shall upon filing a request therefor within 10 days of such compliance, be afforded an opportunity for a hearing and review of the alleged erroneous action by the agency or the Director.

§ 60-60.7 Time schedule for completion.

(a) With the exception of extensions of time granted by the Director of OFCC for good cause shown, within 60 days from the date the affirmative action program, including the workforce analysis, is received by the agency, the compliance agency must either have found the contractor in compliance and notified the contractor of that fact, or must have issued a 30-day show cause notice as required under the rules and regulations pursuant to the Executive Order.

(b) During this period the compliance agency shall

(1) Complete the desk audit.
(2) Schedule the on-site review.
(3) Complete the on-site review.
(4) Complete the off-site analysis, if conducted.
(5) Give notice of compliance or issue show cause notice.
(6) Complete and forward the coding sheet to OFCC.

(c) A contractor's affirmative action plan may be accepted only after the coding sheet has been forwarded to OFCC. The coding sheet is the notification required by § 60-2.2(a)(2) of this chapter. Failure of the compliance agency to give the contractor a notice of compliance or issue a show cause notice within the time period set forth in paragraph (a) shall not be deemed a finding of compliance or acceptance of the contractor's affirmative action program by the compliance agency.

§ 60-60.8 Supersedure.

The requirements of this part 60-60 supersede the prior version of Revised Order No. 14 published at 38 FR 13375, May 21, 1973.

§ 60-60.9 Attachments.

The following formats are set out in full as they give detailed information as to procedures and requirements of value to contractors:

STANDARD COMPLIANCE REVIEW REPORT

Contract Compliance Review Procedure and Report Format
Purpose:

The purpose of these guidelines is to provide compliance officers with a systematic standardized approach to the conducting of a compliance review and the preparation of a comprehensive report under Revised Order No. 14. It is not meant to be an all inclusive or an inflexible document to be used in sequence in the actual conducting of a compliance review, but is an effort to point out the essential elements that should at least be addressed in all such efforts. An analysis of the affirmative action program and support data is required of each contractor facility targeted for review. The purpose of your analysis is to determine if the contractor is in compliance with the requirements of Executive Order 11246, as amended, and the implementing regulations. If your analysis identifies deficiencies, the reasons or possible reasons (including past or present personnel policies or practices) why certain deficiencies exist should be identified and evaluated as well as the appropriateness of the actions the contractor has taken or plans he intends to take. This will enable you to make a determination of whether or not the contractor is in compliance with the Executive Order.

In preparing the actual written report for official submission (which is subject to review by the Office of Federal Contract Compliance), the information must be presented in the prescribed format irrespective of the agency originating the review. The prescribed format is the various items listed below in the order in which they are listed. Instructions for the analysis for each heading are found in the Desk Audit Section, or in the on-Site Review Section of these guidelines.

Part A. Desk Audit Section

I. Identifying Information
II. Workforce Analysis
III. Recruitment, Hiring, Selection and Placement
IV. Promotion and Transfer
V. Terminations
VI. Analysis of Jobs with Substantial Concentrations of Minorities or Women

Part B. On-Site Review

I. Identifying Information
II. Community Survey
III. Initial Contact with Contractor
IV. EEO Policies and Procedures
V. Recruitment, Hiring, Selection and Placement
VI. Promotion and Transfer
VII. Terminations
VIII. Supervisory Positions
IX. Pay Practices
X. Analysis of Jobs with Substantial Concentration of Minorities or Women
XI. Training and Educational Opportunities
XII. Goals and Timetables
XIII. Religious and National Origin Discrimination

In addition, no review is completed until the Coding Sheet is forwarded to OFCC. The Coding Sheet provides the necessary instructions for its completion.

Part A. Desk Audit Section

I. Identifying Information

A. Indicate: the name and address of the contractor; the date the letter was sent requesting the affirmative action program and supporting documentation including the workforce analysis; the date the AAP was received; the type of review (i.e., pre-award, post-award, follow-up or other).

B. In beginning the desk audit, determine and so indicate whether or not there is a utilization analysis for minorities and women that considers the points itemized in 41 CFR 60-2.11. Discuss fully any deficiencies with the analysis. Has the contractor established goals and timetables for minorities and women to the extent required by 41 CFR 60-2.12? If the contractor has not established a goal, does his AAP analyze the factors in 41 CFR 60-2.11? Does the contractor's AAP include all the ingredients listed in 41 CFR 60-2.13? This discussion should be a brief introductory statement to the further analysis which will constitute the desk audit.

II. Workforce Analysis

A. *Composition*

(1) An adequate compliance review must always be founded on a clear understanding of where minorities and women are *not* employed in the contractor's workforce. An overall view of the composition of the workforce should be obtained by reviewing the most recent copy of SF-100 (EEO-1) as well as copies of the official submission for the past year or more. This analysis should indicate such potential problem areas as whether or not minorities and women are employed in higher level job categories, under utilization of women in nonclerical jobs, and concentrations of minorities and/or women in service worker or unskilled categories. The comparison made with the past EEO-1 reports will give some insight into the kind of progress being made by the company in their overall employment pattern. Also review the rank and pertinent data on the establishment in Table C of the OFCC Target Selection and Evaluation System for the past year or more.

(2) Prepare your analysis of this summary information, recognizing that these comparisons are most fundamental in nature and only form the foundation from which to explore minority group and female utilization. Further exploration in the utilization of minorities and women must now be made.

(3) The composition of the workforce by minority group and sex must be understood well beyond EEO-1 job categories and must consider where such employees *are working* and *not working* in individual departments or other units. This is necessary in order to determine whether or not the company is underutilizing minorities or women in certain jobs, and whether or not minority groups or females are employed in specific jobs, and as a result might be identified as members of an "affected class."

B. *Examination of Work Force Analysis*

(1) Review the "workforce analysis" required from the contractor. For the purpose of this report alphabetic or numeric coding or the use of an index of pay and pay ranges is acceptable and should be used when contractors are concerned about confidentiality or salary information.

(2) List the job titles by department in which the minority or female proportions either do *not* generally reflect the minority or female composition of the establishment's labor force or the labor force of the area within which it is reasonable to expect persons to commute. These titles are to be considered "focus job titles." Also list as "focus job titles" areas with substantial concentration of minorities or women and also job titles where minorities or women may be continuing to suffer the effects of past discrimination. These problem areas will now be the principle [sic] focus of the review. Present your analysis for each such "focus job title" listed, including at least all of the following areas:

(a) Is the job group to which this job title belongs addressed as an area of deficiency or source of promotable persons in the affirmative action program? Where certain job titles within a given job group show an inordinate and consistent absence of minorities or women in relation to their availability, the contractor may be required to establish and set forth specific goals and timetables for these job titles separately from the goals for the job group of which they are a part.

(b) Are any problems in the utilization of minority men or minority women or members of a particular minority group (Blacks, Spanish-surnamed Americans, Orientals or American Indians) addressed where necessary through the establishment of separate goals and timetables? See 41 CFR 60-2.12 (k).

(c) In the job group to which this job title belongs, are goals and timetables significant and attainable such that underutilization will be eliminated in a reasonable period of time and that turnover and growth are considered in the establishment of numerical goals, including the use of percentages as backup goal estimates? See 41 CFR 60-2.12.

(d) Are other appropriate actions included in the affirmative action program to remedy current concentrations of minorities or women in certain jobs?

(3) *Evaluation of Contractor's AAP and Focus Job Titles*

(a) If in your analysis, you conclude that the contractor's affirmative action program has satisfactorily addressed each of these areas, then add your analysis of the contractor's past achievements for the relevant focus job title and the current status of attainment in his affirmative action program. Has the contractor met his past goals and is he proceeding at a current rate of progress that implies he will meet current goals? If not, you must determine if the contractor has made a good faith effort to achieve these goals. Cite the specific efforts that you conclude demonstrate good faith. Include your analysis as called for in item XII of the on-site section of these guidelines as part of this desk audit.

(b) If in your analysis, you conclude that the contractor's affirmative action program has not satisfactorily addressed any of these areas, then you must identify the additional information needed. Include the following in your analysis of the contractor's AAP.

(1) Such material as organizational charts.

(2) Promotional sequences and line of progression charts (if established).

(c) In subsequent sections of the desk audit, specific analysis is required. If the information necessary for an adequate analysis is not available in the contractor's affirmative action program or if the focus job titles are not adequately included, a letter to the contractor should be sent prior to the on-site visit informing him of the information that must be available on site. Items for possible inclusion in the letter are: applications and information on applicants (see III B); rejections (see III E); promotions and transfers (see IV); terminations (see V); and job groups (see VI). These items are not intended to be used to impose additional standard reporting requirements on contractors. The regulations require an analysis of each of these areas and the contractor may prepare an analysis that meets the regulations and the contractor's own needs through the affirmative action program and support data. An adequate analysis by the contractor will enable you to prepare an analysis to that called for in each section of this report or to determine that the area is not causing an equal opportunity problem. If the contractor's analysis is inadequate under the regulations, or if the focus job titles cited by you in your review of the workforce analysis are not included, or if information is needed for the three categories cited in 41 CFR 60-60.3(b)(1), then the contractor should be informed of the additional information that must be made available on site. In addition, you must determine that such requests meet the requirements of 41 CFR 60-60.3(b)(1)(a) and (b).

III. Recruitment, Hiring, Selection and Placement

A. OFCC regulations require contractors to conduct an analysis of applicant flow as part of their hiring practices. (41 CFR 60-1.40(b)(2), 60-2.12(1), 60-2.23(a)(2), (3), (4), and 60-2.24(d) and (e).) Review the sections of the affirmative action program that contain this analysis.

B. Prepare as a part of this report, your analysis of the contractor's data on recruitment, hiring, selection and placement. Determine if the data supplied by the contractor is adequate under the regulations and analyze these data. Your analysis should reflect applicant activity for the last year. If the number of applicants in the last year was less than 100, your analysis should include all such applicants. If the number of applicants in the last year was more than 100, your analysis should include an appropriate sample of 10 percent of such applicants or 100, whichever is greater. Summarize total applicants by total, male, female, and male and female minority classifications. While in many cases applicants are not classified by particular job, it should be possible to provide some separation of the applicant flow count into at least broad occupation groups. Report the number of offers of employment for each category and by total, male, female, and male and female minority classifications. The acceptances should be related to the job groups outlined by you in your review of the workforce analysis.

C. If the data supplied by the contractor are inadequate under the regulations or if the data relevant to the focus job titles cited to you in your review of the workforce analysis are not indicated, further information will be necessary. In the letter prior to the on-site visit, advise the contractor to maintain such data in the future and that the following collection of data will be made during the on-site review to determine any problems that may exist in applicant flow

and hiring rates. Because information is more readily accessible on site and to insure that the recruitment, hiring, selection and placement procedures are adequately analyzed, more information will be necessary.

During the on-site review, obtain applications of applicants for blue-collar employment and applicants for white collar employment. You may use a random sample or an immediate past chronological period. You should be sure to include the job titles cited by you in your review of the workforce analysis. Now construct the report described in the paragraph above showing applicants, offers and acceptances by total male, female, and male and female minority classifications by as much organization job grouping detail as possible.

D. Based on the data collected under paragraph B or C above, indicate whether or not the proportion of offers or hires to minorities or women is less than the proportion of applicants who are minorities or women for the particular job groups. If so, the basis for this rejection rate must be investigated and discussed. Discuss the selection procedures used for these jobs. Explore whether or not the distribution of those minorities or women actually employed reflects a current or past lower rate of hire.

E. For any job group identified in paragraph D above as having a lower rate of offers or hires for minorities or women than indicated by the applicant flow, ask the contractor in the letter prior to the on-site visit (or during the on-site review if the information in paragraph B is collected on site), to have available for the on-site review, an analysis showing the reasons for the rejection of applicants for total and by appropriate race and sex groups for these job groups. Reasons include but are not necessarily limited to:

(1) Qualified for some jobs, but no vacancies at time of application.
(2) Failed to fill out application completely.
(3) Failed paper-and-pencil or performance tests.
(4) Failed educational requirements.
(5) Unsatisfactory work history.
(6) Unfavorable credit report.
(7) Unfavorable interview.
(8) Unfavorable reference check.
(9) Failed physical requirements.
(10) Transportation inadequate.
(11) Criminal convictions.
(12) Applicant rejected contractor's offer of employment.

IV. Promotion and Transfer

Review the contractor's analysis of promotions and transfers in his affirmative action program. If such analysis is not available, or if the contractor's analysis is inadequate under the regulations, the investigator should ask the contractor in the letter prior to the on-site review to prepare for the on-site review a list of promotions. If the number of promotions in the last year was less than 100, your analysis should include all such promotions. If the number of promotions in the last year was more than 100 your analysis should include an appropriate sample of 10 percent of such promotions or 100, whichever is greater. A promotion is defined as any personnel action resulting in movement to a position of greater skill, effort or responsibility. Wage increases alone do not determine a promotion. The review should relate name or other identification to minority/majority group status, sex, previous job, department and pay, and new job and department and pay.

V. Termination

Review the contractor's analysis of terminations in his affirmative action program. If such analysis is not available or if the contractor's analysis presented in the affirmative action program is inadequate under the regulations or if the focus job titles cited by you in your review of the workforce analysis are not included, advise the contractor in the letter prior to the on-site review, to prepare for the on-site review a list of terminations, by name or other identification, showing hire and termination date, job assignment, minority/majority group membership and sex. To determine if there is an unfair disparity of company policies, terminations should be reviewed. If the number of terminations in the last year was less than 100, your analysis should include all such terminations. If the number of terminations in the last year was more than 100, your analysis should include an appropriate sample of 10 percent of such terminations or 100, whichever is greater.

VI. Analysis of Jobs with Substantial Concentrations of Minorities or Women

A. Now look again at each of the focus job titles with substantial concentrations of minorities or women as cited by you in your review of the workforce analysis. Based upon your analysis of the workforce composition and your analysis in previous sections, prepare an analysis which includes an identification of those specific jobs wherein the minority or female incumbents could have been denied placement, promotion or transfer due to discrimination.

B. In order to identify an affected class, it will be necessary to review detailed listings of employees in the jobs identified in A above. Inform the contractor in the letter prior to the on-site review that these listings will be required for the on-site review. For all the job groups cited, the contractor should be asked to prepare a list by department, line of progression or unit within which promotion normally occurs of all employees ranked by job in order of progression and indicating for each: name, job title, rate of pay, sex, minority group or nonminority identification, original hire date, and other appropriate seniority dates considered in promotion, transfer or layoffs. If department, job, company or plant seniority dates are utilized by the contractor such dates must be included. Usually, even if seniority is not a guiding factor in promotions, in all but managerial positions, total length of service will be correlated to job entitlement.

Part B. The On-Site Review

I. Identifying Information

Give the dates of the on-site review indicating the date the review was initiated and completed. List the names and titles of contractor personnel contacted in the review.

II. Community Survey

A. Community contacts should be made appropriate and practical prior to the direct meeting with the contractor. Some later confirmations may be required. The number of these contacts depends on the nature of the information available prior to visiting the locale. If there is a regional OFCC office, they may be able to advise you on the effectiveness of some community resources as possible referral sources for minority and women job seekers. A contact with the local office of the State Employment Service is vital to ascertain the substance of the contractor's relationship with that agency. If there is a minority specialist in the office, he or she can be most helpful in orienting you towards other community resources.

B. The following is relevant information which must be reported in this section as determined through community contacts or otherwise:

(1) Report of population and workforce data as specified in Order No. 4.

(2) Indicate other key industries and companies with whom the contractor will be competing for minority and women workers.

(3) List the significant employment oriented organizations which could be referral sources for minorities and women.

(4) Identify the community leaders generally recognized as representing minorities and women.

(5) Comment on the community image of the contractor as an EEO employer and otherwise including the reputation of the contractor's facility as a desirable place to work.

III. Initial Contact with Contractor

A. *Initial Contact*

(1) If this is the initial compliance review experience for the contractor, a brief discussion of the history of the compliance program is appropriate. Otherwise, the contractor need only be brought up-to-date regarding any new policies or changes in the rules and regulations occurring since the previous review. If not adequately determined in the previous review or, if significant changes have occurred, discuss the contractor's overall corporate organization in terms of corporate headquarters, subsidiaries, number of facilities and nature of the inter-facility relationships as it might affect this review.

(2) Discuss the nature and extent of the contractor's Government contract work. How does this relate to the contractor's business? Discuss the major non-exempt subcontractors and determine if the contractor has satisfied his EEO responsibilities in their regard. Have they been notified of their EEO obligations relative to filing the Standard Form 100 and preparing an affirmative action program? Review a sample contract and purchase order form for inclusion of an EEO clause. Does the contractor require a certification of nonsegregated facilities from each nonexempt subcontractor? Does the contractor assure appropriate physical facilities to both sexes?

(3) Any additional information needed for the conduct of this review should be requested during the initial contact to assure its availability while still on-site. A tour of the facility might be appropriate at this time or at least it can be tentatively scheduled for a later point in the review. To avoid unwarranted or unintended interferences with employer-employee relations, the number, content and scope of employee interviews should be discussed with the contractor at this time.

B. *Report of General Information*

Based on the information obtained from the contractor, or researched by you, report on the contractor's corporate organization as it might affect this review. If this material is adequately covered in a previous review, attach a copy of the relevant portion of that review. Attach copies of a sample contract or purchase agreement and a sample certification of nonsegregated facilities as exhibits to this report. Describe the compliance history of the contractor leading up to the previous compliance review indicating the compliance agencies involved and any changes in the compliance posture. What actions has the contractor taken relative to commitments made subsequent to the last compliance review?

IV. EEO Policies and Procedures

A. *External*

Describe how the contractor indicates he has attempted to establish an image of an EEO employer in his community and in his recruitment area.

How does the contractor utilize and support organizations which would assist his efforts and implement his affirmative action program?

B. *Internal*

(1) Are EEO posters prominently displayed? Indicate the type of EEO policy statements that have been issued. By whom and addressed to whom? Are these statements posted? Are they included in employee handbooks or policy manuals? Is the policy statement up-dated periodically? Has management expressed any intention in writing or otherwise to take disciplinary action for failure to adhere to EEO policies and procedures? Does the contractor publicize an EEO achievement? Have out-dated posters mentioning restrictions on employment of females been removed?

(2) Describe the role of the EEO coordinator. What role does the coordinator play in dissemination of policy? How much time does he or she spend in EEO work?

(3) Describe if supervisors are involved in goal setting. How have the lower level supervisors received and disseminated company EEO policy? Are supervisors held accountable for failure to meet EEO goals? Is EEO part of the orientation for new employees and are there periodic meetings with employees and/or supervisors on the subject?

V. Recruitment, Hiring, Selection and Placement

A. *General Procedures*

(1) Review the material in the desk audit section of these guidelines to see that you have completed the required analysis to identify the job titles where fewer offers or acceptances are made to minorities and women and have indicated information needed for on-site analysis.

(2) Provide an analysis based on the following issues with full explanation when necessary, from data gathered at the on-site review. Are different interviewers assigned to interview applicants because of their job interest, race or sex? Is job counseling offered? If not hired, is the applicant given a specific reason? Is it generally the real reason and is it so noted on the application form? If not hired, what happens to the application form? What are the possibilities of the application being retrieved at a later date? Based on the EEO specialist's analysis of records as well as the contractor's statements, has this happened very often? If the employment office does not make final decisions for hire, who does and on what basis? If additional interviews are conducted, is there feedback to the employment office and the EEO Coordinator? Does anyone monitor for disparate rejection ratios of minorities and women? Can and does anyone challenge decisions made by the selecting officials? Are those who make selections conscious of the contractor's goals and timetables? Describe what role if any the Coordinator has in the selection process.

(3) Does the contractor maintain applicant flow data which gives all the necessary information such as name, race, sex, job applied for, source of referral, date of application and disposition? Obtain copies of application forms. Do the forms request information which could be used in a discriminatory manner? Specify the questionable information and who might have access to it. If such information is allegedly asked for affirmative action purposes, could it be maintained on a separate record? Are any questions asked of applicants of one sex but not of applicants of the other sex (e.g., anticipated temporary disability, child care problems, and marital status)? From discussions with interviewers and supervisors as well as from comments appearing on the application forms, what appear to be some of the more subjective criteria considered? (i.e., socio-economic background, illegitimacy, appearance, dress, hair style, geographical, or non-job related school preferences.) Describe the filing system and check to see how long applications are retained. Is there an affirmative action file or other retrieval system to enable minorities and women to be reconsidered if no job can be offered at the time of their original application? Are there written job descriptions or job specifications? If not, what procedures are used instead? Are job requisitions submitted to the employment office in writing and how detailed are they? Are these forms or others used for external recruitment? Sample a representative number of job requisitions on a given date and determine if minorities and women were applying at the same time. The contractor's applicant flow data and application retrieval system should permit this kind of comparison with minimum effort. Obtain samples of any other relevant forms utilized by the personnel operation such as interview reports.

(4) Describe in detail the job application process from the point where the applicant first makes contact with the contractor. Observe the physical layout of the contractor's employment office for any segregation by race or sex of applicants and whether it would be apparent to a job seeker that the contractor has an integrated workforce. What are the responsibilities of any receptionist on duty? Does the receptionist screen applicants or application forms in any way? Is everyone requested to complete an application form at all times?

(5) Does the contractor have a policy on nepotism? If so, is the policy written or applied to effect job opportunities adversely for women more than men? Does there appear to be any selection or placement pattern based on race or sex? Does the contractor claim any bona fide occupational qualifications to justify sex discrimination?

B. *Determination and Analysis of Adverse Effect*

(1) Adverse effect is a differential rate of selection which works to the disadvantage of a covered group. In order to determine whether adverse effect results from the use of "objective" selection requirements, review the data provided by the contractor on the reasons for rejection for the job titles cited by you in the desk audit analysis. Present the number and proportion of non-minority applicants or employees and the number and proportion of minority applicants or employees rejected for each of the cited reasons. Present the same statistics for women and men. Then determine the selection rate for each of these groups by subtracting the rejection rate from 100 percent. If the selection rate for minorities (or women) is less than 80 percent of the selection rate for the remaining applicants for any of the cited reasons, then there is an adverse effect and the selection method must be validated as required by the OFCC Testing and Selection Order. To make this computation, divide the selection rate for the covered group by the selection rate for the remaining applicants and compare the resulting figure with 80 percent. For example, if 30 percent of nonminorities are rejected (100% − 30% = 70% selected) on the basis of educational requirements and 53 percent of minorities are rejected (100% − 53% = 47% selected) on this basis, then there is an adverse effect (i.e., 47 percent divided by 70 percent equals 56 percent, which is less than 80 percent). If no individual reason is causing an adverse effect but the

minorities (or women) selected for employment is less than 80 percent of the remaining applicants selected, then the entire selection process must be reviewed and validated as required by the OFCC Testing and Selection Order. Continue in this section with those job titles where you have determined that there is an adverse effect resulting from one or more "objective" selection requirements. Continue with part (3) below for other job titles cited by you in the desk audit analysis, where there are not "objective" selection requirements causing an adverse effect.

(2) Refer to the Testing and Selection Order (41 CFR 60-3). To meet the requirements of that Order, all contractors must submit certain information. (41 CFR 60-3.4(a), 60-3.6, 60-3.15, 41 CFR 60-2.23(a)(3), 60-2.23(b)(7), (8), (13), 60-2.24 (b), (d).)

(a) To be meaningful, information submitted concerning use of tests should include:

1. Applicable job title or job group.
2. Identifying information on procedures used for selection or promotion of individuals, including the following for paper and pencil or performance tests: name of test, form, and publisher or author.
3. Criteria for acceptance or cut-off score, if applicable.
4. For total candidates tested in the past year, the number of men and women not acceptable. The same information for men and women should be provided for Negroes, Spanish-surnamed Americans, American Indians and Orientals when the group constitutes 2 percent or more of the labor force in the labor market or recruiting area and for nonminority men and women. If no definite criteria of acceptance are used (such as cut-off scores), the average (mean) test score for each group and the scores of the three lowest scoring candidates accepted should be presented.

(b) If the selection procedure for which there is an adverse effect is a paper and pencil or performance measure (see 41 CFR 60-3.2), inquire if this has been validated. If the test has not been validated then the contractor must take appropriate action (e.g., take necessary steps to validate the procedure—during which time cut-off scores may have to be changed or eliminated, or eliminate the adverse effect). The compliance office must determine whether the action taken by the contractor is in accord with 41 CFR 60-3 and testing and selection guidance memoranda issued by OFCC. If the selection procedure has been validated, the contractor must provide evidence to show that the procedure has been validated in accordance with the Order and the compliance officer must review this evidence. For guidelines on reporting validity, refer to 41 CFR 60-3.6 of the Revised Testing and Selection Order as amended in January 1974. You should inform contractors of noncompliance with the Order when validity or evidence supporting validity is absent or substantially deficient. However, since the issues involved in test validity are often quite technical and complex, the compliance officer should not try to identify or resolve these issues during the review. In cases where there are technical or complex issues or any case where the compliance officer cannot make a clear determination of compliance or noncompliance, the contractor's evidence of test validity is to be submitted for higher level review along with the compliance officer's analysis of the adverse effect.

(3) *Underutilization, Higher Rejection Rates and Other Selection Procedures*

For any job groups cited by you in the desk audit where there is underutilization or a higher rejection rate for minorities or women, are selection techniques other than tests used for employment decisions? Such techniques include but are not restricted to unscored or casual interviews, unscored application forms and unscored personal history and background requirements not used uniformly as a basis for qualifying or disqualifying applicants (see 41 CFR 60-3.13). If so, the contractor must either provide the same validation evidence as called for in B above or must adjust employment procedures so as to eliminate the higher rejection rate and underutilization.

(4) *Adequacy of Applicant Flow*

Are the contractor's applicant flow data adequate for the focus job titles cited by you as having underutilization in your review of the workforce analysis? If not, the following further investigation into recruitment methods and resources is necessary during the on-site review.

(a) What procedures are used for external recruitment? Summarize the contractor's explanation of the specific recruitment methods and resources utilized for each focus job title involved. Are minority and women-oriented press or broadcast media utilized? Do recruitment ads, either in words or location in the publication, suggest preference for one sex? Explain the impact of word-of-mouth or other employee referral systems. Explain if recruitment sources are contacted in writing at the time of actual job openings and how much information is provided to them as to the qualifications necessary.

(b) Is the contractor actually aware of the results of the company's recruitment efforts? Has the contractor specifically requested to have minority and women candidates among these referrals? Has the contractor discontinued using any of those sources which have failed to make such referrals? Has the contractor instituted any transportation or housing programs to aid in minority recruitment? What is the contractor's explanation for any failure to attract a significant number of women and minority applicants? Are employment opportunities denied to women with young children but not to men with young children? Does the contractor deny employment opportunities to women or men based on a State "protective" law.

(c) Describe the college recruitment program only if college recruitment is involved for the focus job titles cited in your review of the workforce analysis. Are schools visited with predominately minority or women enrollment? Is

the contractor familiar with some of the lesser known schools? How is this program related to the company's national recruiting program? Describe the blue-collar recruitment program, if applicable.

(d) Identify the appropriate entry level positions and the promotional ladders as indicated by the contractor and by the EEO Specialist's confirmation through sample record analysis. Are these lines in any way oriented by race or sex? Differentiate between those promotions that are automatic and those that are competitive. What is the significance of interest, ability and seniority in promotion and transfer considerations? Are there any periodic written performance ratings which influence promotion or transfer? Explain whether or not minorities or women are concentrated in certain jobs outside any line of progression or which dead-end before the employee can reach the pay grade to which their experience, training or seniority might entitle them. Is there a well structured transfer program? Discuss any lack of representation of minorities and women in this program. Review the file on transfer requests, if any. Have many minorities or women been overlooked or rejected disproportionately? What is the frequency of inter- or intra-departmental transfer for better working conditions or to gain promotional opportunities? Is counseling offered to employees considering this move? How common is transfer from blue-collar to white-collar positions or from "traditionally female" to "traditionally male" jobs or vice versa? Who monitors promotion and transfer activity and through what means? How is job security affected by transfer or promotion and does this disproportionately affect minorities or women?

VI. Promotion and Transfer

A. Based on the information outlined in the desk audit section on promotion and transfers, a determination should now be made if there is a disparity between promotion rate of minorities and women as related to the rate for non-minorities and/or males.

B. Any selection criteria for promotion that is causing a higher rejection rate of minorities or women must be reviewed using the procedure in V B(1) and (2), above.

VII. Terminations

As a result of your analysis of data supplied during the desk audit or on-site, if there is a disproportionate number of terminations because of assignment of minority group members or women to specific kinds of jobs, the causal factor should be explored and discussed on-site. Present the results of that explanation here or state that no such disproportionate effect exists. Are employees of one sex in a certain job title terminated upon reaching a certain age without the same rule applying to the other sex? Are procedures affecting termination validated if there is a disproportionate effect? Refer practices or procedures that may indicate age discrimination to the Wage-Hour Administrator of the U.S. Department of Labor.

VIII. Supervisory Positions

Review the workforce analysis and focus jobs cited by you in the desk audit with specific reference to supervisory positions. Comment on the representation of minorities and women among supervisors and where promotions during the previous year suggest any improvement. If appropriate, review selected personnel records to conduct the following analysis. Explain how supervisors are selected. Who monitors these actions? Explain how supervisory ability is measured. Are minorities and women supervising integrated groups? Are women supervisors generally at a lower plateau in the organization?

Where there is low utilization of minorities or women in supervisory positions, can this be traced to specific past actions in recruitment or placement? Are there selection criteria for supervisory positions that are causing an adverse effect? If so, follow the procedures in V B(1) and V B(2)(b)(1) above. Where minorities and women have been newly installed as supervisors, has there been any negative reaction from the workforce and how has management dealt with it? Is there a supervisory development program? Does this start prior to entry into supervision or is it part of an on-the-job program? Does it include training on EEO matters and problems?

IX. Pay Practices

Review and compare wages and salaries of a sampling of minorities and women within selected job titles. The following list of questions are necessary in making this investigation. Be sure and give a full explanation with each answer.

A. Are there positions with similar duties but with different rates of pay?

(1) Does the incumbent's sex or race have anything to do with these differences in rates of pay?

(2) What is the contractor's explanation for these discrepancies?

B. Are there general salary ranges for jobs or specific rates at which everyone begins?

C. Do minority and women workers appear to be paid lower beginning rates?

(1) What is the contractor's explanation?

(2) Who makes these determinations?

D. Are the rates negotiable?

E. Are minorities or women assigned to jobs where incentive earnings are more difficult?

F. Does review of any employee's records confirm or dispute the relationship of education, training, and experience to the wages being earned?

X. Analysis of Jobs with Substantial Concentrations of Minorities or Women

A. Review the information prepared by the contractor and make a determination as to which, if any, departments or lines of progression within departments appear to have been utilized in the past for discriminatory placement of minorities or women.

B. Now compare the wage or job class range of each such unit with that of departments or lines of progression where whites (or males, if comparing female) are concentrated. Also compare working conditions, degree of skill acquisition, and rapidity of advancement in each unit. Then make a determination as to whether each of the units in which minorities or females are concentrated is less desirable. Take into consideration in this analysis whether progression to the top of one line may lead to advancement to management while the other may not. Additional detail data will probably be required for this analysis.

C. If discriminatory placement has occurred you must attempt to determine if and when the company has ceased discriminatory placement. Begin with a review of your analysis of new hire data, determining whether placement into departments and lines of progression has been oriented according to race or sex. If so, then all present minority and female incumbents of the units identified should be considered members of an affected class. If race or sex no longer appear to be factors in placement of new hires, further inquiry of the contractor must be made to determine when these factors ceased to be considerations in placement. Try to establish a definite date; all incumbents of the units identified hired prior to that date will be identified as members of the affected class.

D. Formulate a definition of the affected class as identified in this review, and identify each member of it. This may be done, for example, by reference to their locations in the seniority list. A typical definition would read as follows:

The affected class shall be considered to be all black employees presently assigned to Progression Lines 1, 2, 3, and 4, who were hired prior to December 31, 1970.

E. Now you must conduct an analysis to determine which business practices are resulting in the denial of equal employment opportunity to those discriminatorily placed in the past. Examine provisions of the collective bargaining agreement, or if no union, the company policy manual, and summarize in the compliance review those provisions having to do with transfer, promotion and layoff, as well as those dealing with the effect of seniority upon such personnel changes. The following must be determined:

(1) May any qualified employees transfer from one employment unit to another?

(2) What kind of seniority—plant, department, seniority unit, job—is the basis for transfer competition?

(3) If lines of progression or promotional sequences are utilized within departments, is seniority the principal determinant of promotion from one job level to the next highest job level? In other words, is progression through the line principally a function of seniority?

(4) What kind of seniority—plant, department, seniority unit, line of progression, or job—is the basis for competition for promotion within lines of progression or seniority units?

(5) What kind of seniority competition is there for reduction in force and layoff?

(6) Assuming that the affected class may transfer, if qualified, to other employment units, the heart of the matter is what losses, in terms of seniority, job retention rights, and wages, they will sustain if they seek to avail themselves of transfer opportunity?

F. Now make a determination as to whether members of the affected class are presently qualified, or can become qualified in the same manner as white or male employees in the past, for jobs in the employment units from which they have been excluded. The most productive technique here is probably comparing present qualifications of the affected class with qualifications of whites (or males) *at the time the whites (or males) were hired.* Make a determination of the qualifications of the least qualified white (or male) currently in the more desirable employment unit.

G. If you have identified an affected class, remedies must be developed for the contractor to be in compliance. Refer to OFCC guidance memos on affected class in developing each step of the remedy. However, in arriving at the nature and extent of the remedy, some insight is needed into the extent that any remedy would be welcomed and utilized by such individuals even with job security assured. It is therefore advisable that selected members of the affected class be interviewed. Your written discussion of the remedy should include the following aspects. Referring to the lines of progression or promotional sequences, which jobs must deadended minorities and women move into in order to progress? Would the affected class employee require additional training to progress? Are the jobs in the promotional sequences functionally related? What changes in the bargaining agreements would be necessary in order to stimulate transfer of affected class members or perhaps make transfer unnecessary? Has the contractor already initiated some action in this regard? When? Could long-time affected class members possibly move up more than one job title immediately or with little training in order to obtain their rightful place in relationship to their company seniority? Note: since this is still a preliminary stage to final agreements, you should avoid unnecessary interferences in employer-employee relationships by giving the contractor the opportunity to discuss remedies with affected class members. If the contractor fails to do this adequately, you should interview selected members of the affected class. Through interviews you should determine whether minorities or women feel the union, if any, is servicing them properly.

(1) *Bargaining Units*

(a) Identify the various unions in the contractor's establishment. Determine if there are any memoranda of understanding or addendums not included in the labor agreement. Obtain copies of all collective bargaining agreements. Do the labor agreements contain an EEO clause? Review these agreements (and attach them along with progression charts to this report) considering, as appropriate, the following:

(b) Are EEO grievances subject to the applicable grievance machinery, if any. If so, with what frequency have such EEO grievances been filed and what have been the results. Does the labor agreement spell out the rights of employees in terms of tenure, layoff, recall, transfer, promotions and the various fringe benefits? Is there a formal posting and bidding procedure for transfer or promotions? What are the criteria for determining the successful bidder? Are minorities and women encouraged to bid into jobs where they have been previously underutilized? How important is seniority? Can an employee hold more than one seniority date? If so, explain what each means and how it was acquired? Do the layoff and recall provisions have a disparate effect on minorities and women? How and why? Have there been any mergers of seniority units or lines of progression, and how has this affected minorities and women? Are there any "understood" or traditional practices which differ from those described in the contract itself? Are disciplinary actions spelled out clearly? (Explain this under Section 3 below.)

(2) *Non-Bargaining Unit Positions*

Determine if there are company policies or procedures in writing which deal with the situations as discussed in the previous paragraph for those positions not covered by any bargaining unit? Does longevity play any role in job security?

(3) *Benefits and Disciplinary Actions*

Review the contractor's personnel manual or its equivalent. Are there any disciplinary policies which would tend to discriminate against minorities or women? What is the policy on maternity leave and is it in accord with OFCC regulations? Does the policy result in rejection or suspension from employment or require involuntary leave solely on account of the condition of pregnancy? Are there any distinctions based upon sex in the granting of fringe benefits, including medical, hospital, accident, life insurance, pension and retirement benefits, profit sharing and bonus plan, credit union benefits, or leave which violate current OFCC regulations? Are the same benefits made available for the wives and families of male employees also made available for the husbands and families of female employees? Does the contractor specify any differences on the basis of sex in either mandatory or optional retirement age?

XI. Training and Educational Opportunities

A. *Internal*

(1) Review the contractor's data on training that has occurred over the past year. Indicate the participation by total, male, female, male and female minority classifications and show the training participating rate for each group. If the number of applicants in the last year was less than 100, your analysis should include all such applicants. If the number of applicants in the last year was more than 100, your analysis should include a sample of 10 percent of such applicants or 100 whichever is greater. Include employees hired directly into such programs. Is participation strictly voluntary or are there selection procedures? Such procedures must be validated if there is an adverse effect.

(2) Inquire about what types of training new employees receive. Is there evidence of any disparate failure or drop-out rate? If such disparities exist, what efforts has the contractor made to correct the situation? How is failure determined? Is it in accord with 41 CFR Part 60-3? Is formal training being required now for jobs not previously involved? If so, have you included this in the section on affected class? If there is a registered apprenticeship program, has the contractor developed an affirmative action program under 29 CFR Part 30 or a State plan for EEO in Apprenticeship? Has the contractor's Apprenticeship AAP been approved by the contractor's apprenticeship registration agency?

B. *External Programs*

Describe any programs offering tuition assistance and the extent of minority and women participation. What is the contractor's explanation for any disproportionate representation of women or minorities? Describe any school work or other cooperative type programs, the minority and female enrollment at these institutions, and the minority and female participation in such programs. Are there any summer school work programs or other Government or privately-funded training on a part time basis? Are there any selection or qualifying procedures that would tend to preclude the involvement of a representative number of minorities and women (e.g., expense, length of training, travel involved, no clear evidence of career advancement, etc.)? After completion of the program, is job placement assured or assistance available?

XII. Goals and Timetables

A. *Achievement of past and present goals and timetables*

Is the contractor meeting the current goals and timetables? Did he meet previous goals and timetables? If not, determine from the contractor his assessment of why the goals were not achieved. Pursue what you deem to be necessary changes for future success in meeting goals. If the contractor is not meeting the current goals and timetables or if the contractor did not meet the previous goals and timetables, a determination of good faith must be made and the determination will be based upon his efforts to broaden his recruitment and promotion base. See B(2) below.

B. *Establishment of present and future goals and timetables*

(1) Specific goals and timetables are to be established separately for minorities and women considering the factors cited in Order 4 and based on the contractor's analysis. In establishing timetables the contractor must consider the anticipated expansion, contraction and turnover of and in the workforce. This would include a review of anticipated vacancies in the major job groupings for the next year and

any other pertinent period related to the affirmative action program.

(a) A goal must be established for each job group in which underutilization exists and must be designed to completely correct the underutilization. The goal must be stated as a percentage of the total employees in the job group and must be equal to the percentage of minorities or women available for work in the job group in accordance with the criteria set forth in 41 CFR 60-2.11.

A single goal for minorities is acceptable, unless through the company's evaluation it is determined that one minority is underutilized in a substantially disparate manner, in which case separate goals and timetables for such minority groups may be required individually, and it may further be required, where appropriate, that separate goals be established within the minority groups by sex. (See Order 4, § 60-2.12(k).)

(b) For each job group in which underutilization exists, a specific timetable must be established for reaching the ultimate goal in the minimum feasible time period.

(c) For each job group in which underutilization exists, the contractor must establish annual rates of hiring and/or promoting minorities and women until the ultimate goal is reached. These rates should be the maximum rates that can be achieved through putting forth every good faith effort, including the use of available recruitment and training facilities, and must not be lower than the percentage rate set in the ultimate goal. Numerical goals based on projected openings are required but cannot be used in place of percentage goals. Goals should be stated both as actual numbers and as percentages for backup goals. That is, a contractor may establish a goal of 10 women based on an expected 20 vacancies for hires or promotions. But his expected vacancies may vary. So he should also give a percentage goal (e.g., 50% of hires) which would apply if opportunities exceed his current estimates.

(d) Each program must contain specific and detailed action oriented programs, including recruitment and training programs, which comply with Revised Order 4. These programs must, among other required ingredients, commit the contractor to undertake every good faith effort to contact and make use of relevant recruitment and training resources available in the community and to use its own resources for recruiting and training minorities and women to fill positions in job groups where underutilization exists. Data regarding promotable employees, community training facilities and company training facilities must be prepared by the company itself, and related to the locality.

(2) How many of these jobs will be filled through upgrading? In considering the current workforce, turnover, and deficiencies identified, are the contractor's goals reasonable and will they achieve prompt and full utilization of minorities and women? Is there evidence that the contractor is considering minorities and women not in the workforce? Make specific suggestions for affirmative action based on problem areas and on areas previously lacking in positive affirmative action, as pointed out by the review. The affirmative action program must appear as an exhibit to this report. Determination of good faith effort should be made which shall include but not be limited to the following:

(a) Notification to the community organizations that the contractor has employment opportunities available and maintenance of records regarding the organizations' response.

(b) Maintenance of a file of the names and addresses of each minority or female worker referred to the contractor and what action was taken with respect to each such referred worker.

(c) Participation in training programs in the area. Full consideration of the training which the contractor can reasonably undertake.

(d) Dissemination of the contractor's EEO policy, by including it in any policy manual; by publicizing it in company or union newspapers, annual report, etc.; by conducting meetings to explain and discuss the policy; by posting of the policy; and by specific review of the policy with minority and female employees.

(e) Dissemination of the EEO policy externally by informing and discussing it with all recruitment sources; by advertising in news media, specifically including minority news media; and by notifying and discussing it with all contractors and subcontractors.

(f) Specific and constant personal (both written and oral) recruitment efforts directed at all minority and female organizations, schools with minority and female students, minority and female recruitment organizations, and training organizations, within the contractor's recruitment area.

(g) Specific efforts to encourage present minority and female employees to make referrals in the recruitment effort.

(h) Validation of all worker specifications, selection requirements, tests, etc., as required by the Testing and Selection Order 41 CFR § 60-3.

(i) Making every effort to provide after-school, summer and vacation employment to minority youths.

(j) Where reasonable, the development of on-the-job training opportunities and participation and assistance in any association or group training programs relevant to the contractor's needs.

(k) Continuing inventory and evaluation of all minority and female personnel for promotion opportunities and encouragement of minority and female employees to seek such opportunities.

(l) Assuring that seniority practices, job classifications, etc., do not have a discriminatory effect.

(m) Assuring that all facilities and activities are nonsegregated.

(n) Continual monitoring of all personnel activities to ensure that its EEO policy is being carried out.

(o) All other sections of Subpart C of Order 4 (41 CFR

60-2.20, 21, 22, 23, 24, and 25) and the OFCC Sex Discrimination Guidelines at 41 CFR Part 60-20.

XIII. Religious and National Origin Discrimination

Refer to the regulations (41 CFR 60-50). Has the contractor reviewed his practices to determine whether members of religious and/or ethnic groups are receiving fair consideration for job opportunities? Describe the outreach and positive recruitment activities undertaken by the contractor to remedy problems identified. (See 41 CFR 60-50.2(b).) Describe any accommodation made by the contractor to the religious observances and practices of an employee or prospective employee. When such situations exist, if the contractor has not made such accommodation, describe the contractor's rationale including, at least: (a) business necessity, (b) financial costs and expenses, and (c) resulting personnel policies.

OFCC: Examination and Copying of OFCC Documents

Following is the text of OFCC regulations governing the examination and copying of OFCC documents. Codified as Title 41, Ch. 60, part 60-40 of the U.S. Code of Federal Regulations, the regulations read as last amended, effective Jan. 23, 1973.

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Section 60-40.1. Purpose and Scope.—This part contains the general rules of the OFCC providing for public access to information from records of the OFCC or its various compliance agencies. These regulations implement 5 U.S.C. 552, the Freedom of Information Act and supplement the policy and regulations of the Department of Labor, 29 CFR Part 70. It is the policy of the OFCC to disclose information to the public and to cooperate with other public agencies as well as private parties seeking to eliminate discrimination in employment. This part sets forth generally the categories of records accessible to the public, the types of records subject to prohibitions or restrictions on disclosure, and the places at which the procedures whereby members of the public may obtain access to and inspect and copy information from records in the custody of the OFCC and the compliance agencies.

Sec. 60-40.2. Information Available on Request.—(a) Upon the request of any person for identifiable records obtained or generated pursuant to Executive Order 11246 (as amended) such records shall be made available for inspection and copying, notwithstanding the applicability of the exemption from mandatory disclosure set forth in 5 U.S.C. 552 subsection (b), if it is determined that the requested inspection or copying furthers the public interest and does not impede any of the functions of the OFCC or the Compliance Agencies except in the case of records disclosure of which is prohibited by law.

(b) Consistent with the above, all contract compliance documents within the custody of the OFCC and the Compliance Agencies shall be disclosed upon request unless specifically prohibited by law or as limited elsewhere herein. The types of documents which if in the custody of the OFCC or Compliance Agencies must be disclosed include, but are not limited to, the following:

(1) Affirmative action plans, whether or not reviewed and finally accepted by the OFCC or the Compliance Agencies except as limited in 41 CFR 60-40.3(a)(1).

(2) Imposed plans and hometown plans, pending or approved.

(3) Text of final conciliation agreements.

(4) Validation studies of tests or other preemployment selection methods.

(5) Dates and times of scheduled compliance reviews.

Sec. 60.40.3. Information Exempt from Compulsory Disclosure and Which May Be Withheld.—(a) The following documents or parts thereof are exempt from mandatory disclosure by the OFCC and the compliance agencies, and should be withheld if it is determined that the requested inspection or copying does not further the public interest and might impede the discharge of any of the functions of the OFCC or the Compliance Agencies.

(1) Those portions of affirmative action plans such as goals and timetables which would be confidential commercial or financial information because they indicate, and only to the extent that they indicate, that a contractor plans major shifts or changes in his personnel requirements and he has not made this information available to the public. A determination by an agency to withhold this type of information should be made only after receiving verification and a satisfactory explanation from the contractor that the information should be withheld.

(2) Those portions of affirmative action plans which constitute information on staffing patterns and pay scales but only to the extent that their release would injure the business or financial position of the contractor, would constitute a release of confidential financial information of an employee or would constitute an unwarranted invasion of the privacy of an employee.

(3) The names of individual complainants.

(4) The assignments to particular contractors of named

compliance officers if such disclosure would subject the named compliance officers to undue harassment or would affect the efficient enforcement of the Executive order.

(5) Compliance investigation files including the standard compliance review report and related documents, during the course of the review to which they pertain or while enforcement action against the contractor is in progress or contemplated within a reasonable time. Thereafter, these reports and related files shall not be disclosed only to the extent that information contained therein constitutes trade secrets and confidential commercial or financial information, inter-agency or intra-agency memoranda or letters which would not be available by law to a private party in litigation with the agency, personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, data which would be exempt from mandatory disclosure pursuant to the "informants privilege" or such information the disclosure of which is prohibited by statute.

(6) Copies of preemployment selection tests used by contractors.

(b) Other records may be withheld consistent with the Freedom of Information Act on a case-by-case basis, with the prior approval of the Director, OFCC.

Sec. 60-40.4. Information Disclosure of Which Is Prohibited by Law.—The Standard Form 100 (EEO-1) which is submitted by contractors to the OFCC, a compliance agency or a Joint Reporting Committee servicing both the OFCC and the EEOC shall be disclosed pending further instruction from the Director, OFCC. The statutory prohibition on disclosure set forth in Section 709(e) of the Civil Rights Act of 1964 is limited by the terms of that section to information obtained pursuant to the authority of title VII of that Act and its disclosure by employees of the EEOC.

Subpart B—Procedures for Disclosure

Sec. 60-40.5. Applicability of Procedures.—Requests for the inspection and copy of information from records in the custody of the OFCC or the Compliance Agencies which are identifiable and available under the provisions of Subpart A of this part shall be made and acted upon as provided in the following sections of this subpart. Officers and employees of the OFCC and the Compliance Agencies are authorized by the Director, OFCC to continue to furnish to the public, informally and without compliance with these procedures, information and copies from its records which prior to the enactment of the Freedom of Information Act (5 U.S.C. 552) were customarily furnished in the regular performance of their duties.

Sec. 60-40.6. To Whom to Direct Requests.—A request for contract compliance records or information shall be directed to the Director of Contract Compliance of the agency designated as the appropriate Compliance Agency for the industry to which the records pertain, pursuant to 41 CFR 60-1.3(d). If the person making the request does not know in which Compliance Agency the record is located, he may direct his request to the Director, Office of Federal Contract Compliance, Department of Labor, 14th and Constitution Avenue, N.W., Washington, D.C. 20210, for appropriate handling.

Sec. 60-40.7. Partial Disclosure.—If a requested record contains some materials which are protected from disclosure and other materials which are not so protected, identifying details or protected matters shall be deleted wherever analysis indicates that such deletions are feasible. Whenever such deletions are made, the remainder of the records may be disclosed.

Sec. 60-40.8. Facilities and Procedures for Disclosure.—(a) Procedural matters such as where the information may be inspected, forms of requests, time for reply to requests, forms of denials, appeals from denials, and fees for special services and copying services, shall be controlled by the general regulations of the custodial agency except to the extent modified herein.

(b) Procedures relating to the availability of records in the custody of the OFCC shall be governed by the Department of Labor regulations, 29 CFR 40.35 to 29 CFR 70.64.

(c) Copies of all requests for disclosure of information made directly to the Compliance Agencies shall be submitted to the OFCC within 5 calendar days of receipt. The compliance agencies shall thereafter allow 5 working days from the time the request is submitted to the OFCC for comment by the OFCC. Delay by the OFCC may be waived at the request of the compliance agency.

(d) The Compliance Agencies shall furnish the OFCC with copies of all initial actions by the agencies granting or denying a request for information. The OFCC shall be given an opportunity by the Compliance Agencies to consult on all appeals from initial decisions denying requests for information.

Nondiscrimination on the Basis of Sex

(The following is the text of the regulations issued by the Department of Health, Education, and Welfare under Title IX of the Educational Amendments of 1972. The regulations became effective July 21, 1975. The full text has been provided, including the subparts relating to student admission and recruitment and to student participation in education programs and activities as well as the subpart relating to employment. Implementation of these regulations is expected to affect the available supply of women qualified to perform many different kinds of jobs in all sectors of the economy.)

PART 86—NONDISCRIMINATION ON THE BASIS OF SEX UNDER FEDERALLY ASSISTED EDUCATION PROGRAMS AND ACTIVITIES

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Subpart A—Introduction

§ 86.1 Purpose and effective date.

The purpose of this part is to effectuate title IX of the Education Amendments of 1972, as amended by Pub. L. 93-568, 88 Stat. 1855 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484. The effective date of this part shall be July 21, 1975.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682, as amended by Pub. L. 93-568, 88 Stat. 1855, and Sec. 844, Education Amendments of 1974, 88 Stat. 484, Pub. L. 93-380)

§ 86.2 Definitions.

As used in this part, the term—

(a) *"Title IX"* means title IX of the Education Amendments of 1972, Pub. L. 92-318, as amended by section 3 of Pub. L. 93-568, 88 Stat. 1855, except §§ 904 and 906 thereof; 20 U.S.C. §§1681, 1682, 1683, 1685, 1686.

(b) *"Department"* means the Department of Health, Education, and Welfare.

(c) *"Secretary"* means the Secretary of Health, Education, and Welfare.

(d) *"Director"* means the Director of the Office for Civil Rights of the Department.

(e) *"Reviewing Authority"* means that component of the Department delegated authority by the Secretary to appoint, and to review the decisions of, administrative law judges in cases arising under this Part.

(f) *"Administrative law judge"* means a person appointed by the reviewing authority to preside over a hearing held under this Part.

(g) *"Federal financial assistance"* means any of the following, when authorized or extended under a law administered by the Department:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

(h) *"Recipient"* means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

(i) *"Applicant"* means one who submits an application, request, or plan required to be approved by a Department official, or by a recipient, as a condition to becoming a recipient.

(j) *"Educational institution"* means a local educational agency (L.E.A.) as defined by section 801(f) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 881), a preschool, a private elementary or secondary school, or an applicant or recipient of the type defined by paragraph (k), (l), (m), or (n) of this section.

(k) *"Institution of graduate higher education"* means an institution which:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences; or

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

(l) *"Institution of undergraduate higher education"* means:

(1) An institution offering at least two but less than four years of college level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) An agency or body which certifies credentials or offers degrees, but which may or may not offer academic study.

(m) *"Institution of professional education"* means an institution (except any institution of undergraduate higher education) which offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the United States Commissioner of Education.

(n) *"Institution of vocational education"* means a school or institution (except an institution of professional or graduate or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers fulltime study.

(o) *"Administratively separate unit"* means a school, department or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

(p) *"Admission"* means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

(q) *"Student"* means a person who has gained admission.

(r) *"Transition plan"* means a plan subject to the approval of the United States Commisioner of Education pursuant to section 901(a)(2) of the Education Amendments of 1972, under which an educational institution operates in making the transition from being an educational institution which admits only students of one sex to being one which admits students of both sexes without discrimination.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.3 Remedial and affirmative action and self-evaluation.

(a) *Remedial action.* If the Director finds that a recipient has discriminated against persons on the basis of sex in

an education program or activity, such recipient shall take such remedial action as the Director deems necessary to overcome the effects of such discrimination.

(b) *Affirmative action.* In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex. Nothing herein shall be interpreted to alter any affirmative action obligations which a recipient may have under Executive Order 11246.

(c) *Self-evaluation.* Each recipient education institution shall, within one year of the effective date of this part:

(i) Evaluate, in terms of the requirements of this part, its current policies and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and non-academic personnel working in connection with the recipient's education program or activity;

(ii) Modify any of these policies and practices which do not or may not meet the requirements of this part; and

(iii) Take appropriate remedial steps to eliminate the effects of any discrimination which resulted or may have resulted from adherence to these policies and practices.

(d) *Availability of self-evaluation and related materials.* Recipients shall maintain on file for at least three years following competition of the evaluation required under paragraph (c) of this section, and shall provide to the Director upon request, a description of any modifications made pursuant to subparagraph (c)(ii) and of any remedial steps taken pursuant to subparagraph (c) (iii).

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.4 Assurance required.

(a) *General.* Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Director, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the Director if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with § 86.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Director of such assurance.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used to provide an education program or activity.

(2) In the case of Federal financial assistance extended to provide personal property, such assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases such assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Form.* The Director will specify the form of the assurances required by paragraph (a) of this section and the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.5 Transfers of property.

If a recipient sells or otherwise transfers property financed in whole or in part with Federal financial assistance to a transferee which operates any education program or activity, and the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government both the transferor and the transferee shall be deemed to be recipients, subject to the provisions of Subpart B.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.6 Effect of other requirements.

(a) *Effect of other Federal provisions.* The obligations imposed by this part are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, as amended; sections 799A and 845 of the Public Health Service Act (42 U.S.C. 295h-9 and 298b-2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); the Equal Pay Act (29 U.S.C. 206 and 206(d); and any other Act of Congress or Federal regulation.

(Secs. 901, 902, 905, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1685)

(b) *Effect of State or local law or other requirements.* The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement which would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) *Effect of rules or regulations of private organizations.* The obligation to comply with this part is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association which would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant

or student, on the basis of sex, in any education program or activity operated by a recipient and which receives or benefits from Federal financial assistance.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.7 Effect of employment opportunities.

The obligation to comply with this Part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for members of one sex than for members of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.8 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) *Complaint procedure of recipient.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.9 Dissemination of policy.

(a) *Notification of policy.* (1) Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational programs or activities which it operates, and that is required by title IX and this part not to discriminate in such a manner. Such notification shall contain such information, and be made in such manner, as the Director finds necessary to apprise such persons of the protections against discrimination assured them by title IX and this part, but shall state at least that the requirement not to discriminate in education programs and activities extends to employment therein, and to admission thereto unless Subpart C does not apply to the recipient, and that inquiries concerning the application of title IX and this part to such recipient may be referred to the employee designated pursuant to § 86.8, or to the Director.

(2) Each recipient shall make the initial notification required by paragraph (a)(1) of this section within 90 days of the effective date of this part or of the date this part first applies to such recipient, whichever comes later, which notification shall include publication in: (i) Local newspapers; (ii) newspapers and magazines operated by such recipient or by student, alumnae, or alumni groups for or in connection with such recipient; and (iii) memoranda or other written communications distributed to every student and employee of such recipient.

(b) *Publications.* (1) Each recipient shall prominently include a statement of the policy described in paragraph (a) of this section in each announcement, bulletin, catalog, or application form which it makes available to any person of a type described in paragraph (a) of this section, or which is otherwise used in connection with the recruitment of students or employees.

(2) A recipient shall not use or distribute a publication of the type described in this paragraph which suggests, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part.

(c) *Distribution.* Each recipient shall distribute without discrimination on the basis of sex each publication described in paragraph (b) of this section, and shall apprise each of its admission and employment recruitment representatives of the policy of nondiscrimination described in paragraph (a) of this section, and require such representatives to adhere to such policy.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

Subpart B—Coverage

§ 86.11 Application.

Except as provided in this subpart, this Part 86 applies to every recipient and to each education program or activity operated by such recipient which receives or benefits from Federal financial assistance.

§ 86.12 Educational institutions controlled by religious organizations.

(a) *Application.* This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.

(b) *Exemption.* An educational institution which wishes to claim the exemption set forth in paragraph (a) of this section, shall do so by submitting in writing to the Director

a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.13 Military and merchant marine educational institutions.

This part does not apply to an educational institution whose primary purpose is the training of individuals for a military service of the United States or for the merchant marine.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.14 Membership practices of certain organizations.

(a) *Social fraternities and sororities.* This part does not apply to the membership practices of social fraternities and sororities which are exempt from taxation under Section 501(a) of the Internal Revenue Code of 1954, the active membership of which consists primarily of students in attendance at institutions of higher education.

(b) *YMCA, YWCA, Girl Scouts, Boy Scouts and Camp Fire Girls.* This part does not apply to the membership practices of the Young Men's Christian Association, the Young Women's Christian Association, the Girl Scouts, the Boy Scouts and Camp Fire Girls.

(c) *Voluntary youth service organizations.* This part does not apply to the membership practices of voluntary youth service organizations which are exempt from taxation under Section 501(a) of the Internal Revenue Code of 1954 and the membership of which has been traditionally limited to members of one sex and principally to persons of less than nineteen years of age.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; Sec. 3(a) of P.L. 93-568, 88 Stat. 1862, amending Sec. 901)

§ 86.15 Admissions.

(a) Admissions to educational institutions prior to June 24, 1973, are not covered by this part.

(b) *Administratively separate units.* For the purposes only of this section, §§ 86.15 and 86.16, and Subpart C, each administratively separate unit shall be deemed to be an educational institution.

(c) *Application of Subpart C.* Except as provided in paragraphs (c) and (d) of this section, Subpart C applies to each recipient. A recipient to which Subpart C applies shall not discriminate on the basis of sex in admission or recruitment in violation of that subpart.

(d) *Educational institutions.* Except as provided in paragraph (e) of this section as to recipients which are educational institutions, Subpart C applies only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(e) *Public institutions of undergraduate higher education.* Subpart C does not apply to any public institution of undergraduate higher education which traditionally and continually from its establishment has had a policy of admitting only students of one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.16 Educational institutions eligible to submit transition plans.

(a) *Application.* This section applies to each educational institution to which Subpart C applies which:

(1) Admitted only students of one sex as regular students as of June 23, 1972; or

(2) Admitted only students of one sex as regular students as of June 23, 1965, but thereafter admitted as regular students, students of the sex not admitted prior to June 23, 1965.

(b) *Provision for transition plans.* An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of Subpart C unless it is carrying out a transition plan approved by the United States Commissioner of Education as described in § 86.17, which plan provides for the elimination of such discrimination by the earliest practicable date but in no event later than June 23, 1979.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.17 Transition plans.

(a) *Submission of plans.* An institution to which § 86.15 applies and which is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

(b) *Content of plans.* In order to be approved by the United States Commissioner of Education, a transition plan shall:

(1) State the name, address, and Federal Interagency Committee on Education (FICE) Code of the educational institution submitting such plan, the administratively separate units to which the plan is applicable, and the name, address, and telephone number of the person to whom questions concerning the plan may be addressed. The person who submits the plan shall be the chief administrator or president of the institution, or another individual legally authorized to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate unit admits students of both sexes, as regular students and, if so, when it began to do so.

(3) Identify and describe with respect to the educational institution or administratively separate unit any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to eliminate as soon as practicable each obstacle so identified and indicate the schedule for taking these steps and the individual directly responsible for their implementation.

(5) Include estimates of the number of students, by sex, expected to apply for, be admitted to, and enter each class during the period covered by the plan.

(6) *Nondiscrimination.* No policy or practice of a recipient to which § 86.16 applies shall result in treatment of applicants to or students of such recipient in violation of Subpart C unless such treatment is necessitated by an obstacle identified in paragraph (b)(3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b)(4) of this section.

(d) *Effects of past exclusion.* To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which § 86.16 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment programs which emphasize the institution's commitment to enrolling students of the sex previously excluded.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.18-86.20 [Reserved]

Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

§ 86.21 Admission.

(a) *General.* No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which this subpart applies, except as provided in §§ 86.16 and 86.17.

(b) Specific prohibitions. (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this Subpart applies shall not:

(i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

(ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) Otherwise treat one individual differently from another on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable.

(c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies:

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex;

(2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice which so discriminates or excludes;

(3) Shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and

(4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is "Miss" or "Mrs." A recipient may make pre-admission inquiry as to the sex of an applicant for admission, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.22 Preference in admission.

A recipient to which this subpart applies shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity which admits as students [only] or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.23 Recruitment.

(a) *Nondiscriminatory recruitment.* A recipient to which this subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to § 86.3(a), and may choose to undertake such efforts as affirmative action pursuant to § 86.3(b).

(b) *Recruitment at certain institutions.* A recipient to which this subpart applies shall not recruit primarily or exclusively at educational institutions, schools or entities which admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§§ 86.24-86.30 [Reserved]

Subpart D—Discrimination on the Basis of Sex in Education Programs and Activities Prohibited

§ 86.31 Education programs and activities.

(a) *General.* Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives or benefits from Federal financial assistance. This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of (1) a recipient to which Subpart C does not apply, or (2) an entity, not a recipient, to which Subpart C would not apply if the entity were a recipient.

(b) *Specific prohibitions.* Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(5) Discriminate against any person in the application of any rules of appearance;

(6) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

(7) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

(8) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) *Assistance administered by a recipient educational institution to study at a foreign institution.* A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, which are designed to provide opportunities to study abroad, and which are awarded to students who are already matriculating at or who are graduates of the recipient institution; *Provided*, a recipient educational institution which administers or assists in the administration of such scholarships, fellowships, or other awards which are restricted to members of one sex provides, or otherwise makes available reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) *Programs not operated by recipient.* (1) This paragraph applies to any recipient which requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or which facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient:

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of such recipient which this part would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.32 Housing.

(a) *Generally.* A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient.* (1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) *Other housing.* (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than provided by such recipient.

(2) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such reasonable action as may be neces-

sary to assure itself that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole: (i) Proportionate in quantity and (ii) comparable in quality and cost to the student. A recipient may render such assistance to any agency, organization, or person which provides all or part of such housing to students only of one sex.

(Secs. 901, 902, 907, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1686)

§ 86.33 Comparable facilities.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374)

§ 86.34 Access to course offerings.

A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

(a) With respect to classes and activities in physical education at the elementary school level, the recipient shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. With respect to physical education classes and activities at the secondary and post-secondary levels, the recipient shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(b) This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(c) This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(d) Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards which do not have such effect.

(e) Portions of classes in elementary and secondary schools which deal exclusively with human sexuality may be conducted in separate sessions for boys and girls.

(f) Recipients may make requirements based on vocal range or quality which may result in a chorus or choruses of one or predominantly one sex.

(Sec. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.35 Access to schools operated by L.E.A.s.

A recipient which is a local educational agency shall not, on the basis of sex, exclude any person from admission to:

(a) Any institution of vocational education operated by such recipient; or

(b) Any other school or educational unit operated by such recipient, unless such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities, comparable to each course, service, and facility offered in or through such schools.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.36 Counseling and use of appraisal and counseling materials.

(a) *Counseling.* A recipient shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.

(b) *Use of appraisal and counseling materials.* A recipient which uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials which permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination in the instrument or its application.

(c) *Disproportion in classes.* Where a recipient finds that a particular class contains a substanially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

§ 86.37 Financial assistance.

(a) *General.* Except as provided in paragraphs (b), (c) and (d) of this section, in providing financial assistance to any of its students, a recipient shall not: (1) On the basis of sex, provide different amount or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise

discriminate; (2) through solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex; or (3) apply any rule or assist in application of any rule concerning eligibility for such assistance which treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

(b) *Financial aid established by certain legal instruments.* (1) a recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which requires that awards be made to members of a particular sex specified therein; *Provided,* that the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

(2) To ensure nondiscriminatory awards of assistance as required in subparagraph (b)(1) of this paragraph, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to east student selected under subparagraph (b)(2)(i) of this paragraph; and

(iii) No student is denied the award for which he or she was selected under subparagraph (b)(2)(i) of this paragraph because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(c) *Athletic scholarships.* (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and §86.41 of this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)

§ 86.38 Employment assistance to students.

(a) *Assistance by recipient in making available outside employment.* A recipient which assists any agency, organization or person in making employment available to any of its students:

(1) Shall assure itself that such employment is made available without discrimination on the basis of sex; and

(2) Shall not render such services to any agency, organization, or person which discriminates on the basis of sex in its employment practices.

(b) *Employment of students by recipients.* A recipient which employs any of its students shall not do so in a manner which violates Subpart E.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.39 Health and insurance benefits and services.

In providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner which would violate Subpart E if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service which may be used by a different proportion of persons of one sex than of the other, including family planning services. However, any recipient which provides full coverage health service shall provide gynecological care.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.40 Marital or parental status.

(a) *Status generally.* A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.* (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation in the normal education program or activity so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section shall ensure that the instructional program in the separate program is comparable to that offered to non-pregnant students.

(4) A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery there-

from in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

(5) In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.41 Athletics.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for membership of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact.

(c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(i) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(ii) The provision of equipment and supplies;

(iii) Scheduling of games and practice time;

(iv) Travel and per diem allowance;

(v) Opportunity to receive coaching and academic tutoring;

(vi) Assignment and compensation of coaches and tutors;

(vii) Provision of locker rooms, practice and competitive facilities;

(viii) Provision of medical and training facilities and services;

(ix) Provision of housing and dining facilities and services;

(x) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Director may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)

§ 86.42 Textbooks and curricular material.

Nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.43-86.50 [Reserved]

Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs and Activities Prohibited

§ 86.51 Employment.

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this Subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity which admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of this part.

(b) *Application.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including social or recreational programs; and

(10) Any other term, condition, or privilege of employment.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.52 Employment criteria.

A recipient shall not administer or operate any test or other criterion for any employment opportunity which has a disproportionately adverse effect on persons on the basis of sex unless:

(a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.53 Recruitment.

(a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have in the past so discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) *Recruitment patterns.* A recipient shall not recruit primarily or exclusively at entities which furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.54 Compensation.

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.55 Job classification and structure.

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements which classify persons on the basis of sex, unless sex is a bona-fide occupational qualification for the positions in question as set forth in § 86.51.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.56 Fringe benefits.

(a) *"Fringe benefits" defined.* For purposes of this part, "fringe benefits" means: any medical, hospital, accident, life insurance or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of §86.54.

(b) *Prohibitions.* A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal contributions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex or which otherwise discriminates in benefits on the basis of sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.57 Marital or parental status.

(a) *General.* A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy.* A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnanacy, termination of pregnancy, or recovery therefrom.

(c) *Pregnancy as a temporary disability.* A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave.* In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status which she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.58 Effect of State or local law or other requirements.

(a) *Prohibitory requirements.* The obligation to comply with this subpart is not obviated or alleviated by the existence of any State or local law or other requirement which imposes prohibitions or limits upon employment of members of one sex which are not imposed upon members of the other sex.

(b) *Benefits.* A recipient which provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same compensation, service, or benefit to members of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.59 Advertising.

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex is a *bona-fide* occupational qualification for the particular job in question.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.60 Pre-employment inquiries.

(a) *Marital status.* A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment including whether such applicant is "Miss or Mrs."

(b) *Sex.* A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.61 Sex as a bona-fide occupational qualification.

A recipient may take action otherwise prohibited by this subpart provided it is shown that sex is a bona-fide occupa-

tional qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section which is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§§ 86.62-86.70 [Reserved]

Subpart F—Procedures [Interim]

§ 86.71 Interim procedures.

For the purposes of implementing this part during the period between its effective date and the final issuance by the Department of a consolidated procedural regulation applicable to title IX and other civil rights authorities administered by the Department, the procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 45 CFR §§ 80-6—80-11 and 45 CFR Part 81.

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